Supreme Court, U.S.
FILED
AUG 4 1986
JOSEPH F. SPANIOL, JR.
CLERK

86 No. 96

IN THE

Supreme Court of the United States

October Term, 1986

CLAUDE HOLLAND,

Petitioner,

against

C.J. SCULLY, Warden, Green Haven Correctional Facility, and ROBERT ABRAMS, Attorney General of the State of New York,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOHN J. SANTUCCI
District Attorney
Queens County
Attorney for Petitioner
125-01 Queens Boulevard
Kew Gardens, New York 11415
(718) 520-5563

WILLIAM SCHRAGER
RAY F. CERRETA
Assistant District Attorneys
of Counsel

Questions Presented

Did the joint trial of petitioner and his two co-defendants violate *Bruton* v. *United States*, and if so, was that violation harmless beyond a reasonable doubt; or could the co-defendants' statements have been admitted under *Lee* v. *Illinois*.

Parties

The parties to the Matter are Claude Holland; C.J. Scully, Superintendent Green Haven Correctional Facility; and Robert Abrams, Attorney General of the State of New York.

TABLE OF CONTENTS

	PAGE
Questions Presented	I
Parties	II
Jurisdictional Statement	1
Opinions Below	1
Statement of the Case	2
Statement of Facts	4
Introduction	4
The Preparation for the Crime	4
The Robbery and Shooting	6
The Aftermath	7
Petitioner Holland's Statement	8
Payton's Statement	11
Moore's Statement	13
Reasons for Granting the Writ of Certiorari	14
The joint trial of the petitioner and his co-defendants did not constitute a *Bruton* violation, and any possible error was rendered harmless by overwhelming independent evidence	14
Verdict and Sentence	14
Conclusion	23

PAGE

Appendices:

Decision of the State Supreme Court, Queens County (Agresta, J.) 10/14/77 ..... 1a

Report and Recommendation of the United States Magistrate, Michael H. Dolinger 9/5/85 12a

Order of the United States District Court for the Southern District of New York, Judge Charles E. Steward 2/11/86 ..... 57a

Decision of the United States Court of Appeals for the Second Circuit 7/27/86 61a

TABLE OF AUTHORITIES

PAGE

Cases:

Bruton v. United States, 391 U.S. 123 (1968) 4, 14

Chapman v. California, 386 U.S. 18 (1967) 18

Delaware v. Van Arsdall, 54 U.S.L.W. 4347 (S. Ct. April 7, 1986) 18, 19

Harrington v. California, 395 U.S. 250 (1969) 18

Hawkins v. LeFevre, 758 F.2d 866 (2d Cir. 1986) 18

Lee v. Illinois, 54 U.S.L.W. 4555 (S. Ct. June 3, 1986) 21

Parker v. Randolph, 442 U.S. 62 (1979) 14

Schneble v. Florida, 405 U.S. 427 (1972) 18, 21

United States ex rel. Ortiz v. Fritz, 476 F.2d 37 (2d Cir. 1973) *cert. den.*, 414 U.S. 1075 17

United States ex rel. Stanbridge v. Zelker, 514 F.2d 45 (2d Cir., 1975) *cert. den.*, 432 U.S. 872 17

No.

IN THE

Supreme Court of the United States

October Term, 1986

CLAUDE HOLLAND,

Petitioner,

against

C.J. SCULLY, Warden, Green Haven Correctional Facility, and ROBERT ABRAMS, Attorney General of the State of New York,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Jurisdictional Statement

The judgment of the United States Court of Appeals for the Second Circuit was entered July 7, 1986.

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit appears at 61a hereto. The opinion the United States District Court for the Southern District

of New York appears at 57a hereto. The report and recommendation of the United States Magistrate appears at 12a hereto. The affirmance without an opinion of the Supreme Court of the State of New York, Appellate Division, Second Department, is reported at 80 A.D.2d 753, 437 NYS2d 214 (1981). The New York Court of Appeals denied leave at 53 N.Y.2d 843 (1981). The decision of the trial court, Justice Thomas Agresta appears at 1a herto.

Statement of the Case

On November 16, 1977 petitioner Claude Holland and co-defendants, Percy Moore and Richard Payton, were convicted of felony murder (N.Y. Penal Law §125.25) by a jury, Agresta, J., presiding, in the New York Supreme Court, Queens County. The Petitioner was sentenced to an indeterminate prison term of 25 years to life on December 14, 1977.

On direct appeal of his judgment of conviction to the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, the petitioner asserted *inter alia* a *Bruton* violation. The Appellate Division unanimously affirmed the judgment without opinion on February 23, 1981 (80 A.D.2d 753)

On April 30, 1981 the New York Court of Appeals denied the petitioner leave to appeal (Wachtler, J.).

After the direct appeal, and in May of 1982, the petitioner filed a *pro se* motion to vacate his conviction under N.Y. Criminal Procedure Law §440.10. This motion was

denied by the New York State Supreme Court, Queens County (Agresta, J.), on June 14, 1982. On September 24, 1982 the Appellate Division, Second Judicial Department (Damiani, J.), denied the petitioner's application to appeal the denial of that decision. On February 15, 1983 the petitioner filed a *pro se* motion with the Appellate Division, Second Judicial Department, to reargue his original direct appeal. The Appellate Division denied the motion without an opinion. The New York Court of Appeals denied leave to appeal the decision on the motion to reargue because such a decision is not appealable under N.Y. Criminal Procedure Law §460.20.

The petitioner filed a *pro se* petition seeking a writ of habeas corpus in the United States District Court on January 6, 1984. Counsel was assigned and an amended petition was filed on September 4, 1984. On September 5, 1985 Magistrate Michael Dolinger issued a Report and Recommendation, denying the petition.

On February 11, 1986 Honorable Charles E. Stewart, Judge of the United States District Court for the Southern District of New York, accepted the Magistrate's Report and denied the petition. A certificate of probable cause to appeal to the United States Court of Appeals for the Second Circuit was granted by Judge Stewart on March 3, 1986.

On July 7, 1986 the Court of Appeals reversed the decision of the District Court remanding to that court with a direction to grant the writ unless petitioner is retried within a reasonable time.

Statement of Facts

Introduction

Petitioner, Claude Holland, and co-defendants, Percy Moore and Richard Payton, were charged with two counts of murder in the second degree (intentional and felony), robbery in the first degree, and criminal possession of a weapon in the second degree alleging that on June 25, 1976, while acting in concert they robbed a check-cashing facility and in the course of the robbery they shot the security guard, an off-duty police officer, George Caccavale.

All three defendants made post arrest statements to the police and/or the district attorney before trial in the State Supreme Court, and all the defendants moved for a severance under *Bruton* v. *United States*, 391 U.S. 123 (1968) because the State intended to introduce statements from each of them that might inculpate the others. In addition, the defedants moved to suppress their own inculpatory statements, under *Miranda* v. *Arizona*, 384 U.S. 436 (1966). After nine days of testimony, State Supreme Court Justice Thomas Agresta denied the pretrial motions to the extent that they sought seperate trials, holding that severance was not required under *Bruton* because each of the defendants had made statements implicating themselves as well as their co-defendants. (11a).

The Preparation for the Crime

In late May of 1976 co-defendants Richard Payton and Percy Moore left Chicago at the behest of the petitioner Claude Holland in order to make some money in New York, Payton packing two revolvers into his suitcase. The two

stayed at the home of Holland from their arrival in New York until June 25, 1976, the day of the shooting.

On or about June 11th, Holland, Payton, Moore and Arthur Elliott arrived at Van Dam Check Cashing for the purpose of robbery, but the attempt was cancelled when Holland noticed the "money man," George Caccavale, carrying a gun. Another attempt was made on the 18th of June, but the men arrived too late.

On June 24, 1976, at about 3:30 p.m., **Caryl Thompson** was held up at gunpoint by Holland and Moore in the elevator of his home in Brooklyn, during which robbery he was relieved of his wallet, which contained his driver's license and car registration. Caryl Thompson positively identified Claude Holland as one of the gunmen.

Arthur Elliott testified that on the evening of June 24 he visited the apartment of Holland, whom he knew from work. Holland introduced Elliott to Moore and Payton, and told him that they were planning to rob the Van Dam facility; he asked whether Elliott wanted to make some money. Elliott agreed. He testified that the plan called for him to take his truck and pick up Moore and Payton at 9:00 a.m. the next morning at a designated rendezvous point. Holland would arrive in his own car. The three men told Elliott that Moore and Payton were going to rent a getaway van from Goldie's Leasing, using someone else's driver's license. Elliott was shown a driver's license that the trio had secured to rent the van the next day and was told that the man who owned the license looked similar to him.

The following morning, June 25, 1976, at about 8:00 a.m.. **Gerald Green,** the owner of Goldie's Leasing Company, rented a red van to a man who presented Green with a driver's license bearing the name and address of Caryl Thompson. Green positively identified Percy Moore to be the man to whom he rented the red van that morning. Moore, in his statement to police, admitted being that man.

The Robbery and Shooting

At approximately 9:00 a.m. that same Friday morning, **DeMary Alicea** and her husband, Amilcar, arrived at the Van Dam Check Cashing facility in Long Island City, Queens, to open it for business as they normally did in their capacity as managers.

While her husband unlocked the three doors necessary to open the check cashing place, DeMary Alicea kept watch of the area outside as she usually did. Her attention was drawn to a man in a red Goldie's van who was staring at her; she noticed that he appeared to be eating something. Mrs. Alicea positively identified this man to be Percy Moore.

Within minutes of the Aliceas' opening Van Dam Check Cashing, George Caccavale, an off-duty New York City transit detective who delivered cash for several payrolls to the check cashing facility, drove directly up to the front door of Van Dam. Caccavale was carrying three payrolls, amounting to $64,500 in total. The money had been separated into three canvas bags. The Aliceas, from inside the check cashing business, saw Caccavale pull up in his car and heard him beep the car horn three times as he usually did. A number of People's witnesses then heard

or saw a man fire three or four shots at Caccavale, who fell to the ground. One witness saw the gunman take a canvas money bag from the deceased and return to the van, which then drove off down Van Dam Street toward the Long Island Expressway.

The Aftermath

Meanwhile, **Arthur Elliott** testified that he was waiting at Laurel Hill Boulevard when he noticed Claude Holland in his car a half-block away. He waived to him. After only five or seven minutes, a red Goldie's van arrived bearing Richard Payton and Percy Moore. Payton and Moore climbed out of the van and into the back of Elliott's truck, carrying a money bag, whereupon Elliott drove off, followed by Holland, to his mother-in-law's house on Washington Avenue in Brooklyn. With Percy Moore carrying the money bag, all four men went into the apartment—Elliott to the front room to watch out the window, the others to the back room. The money was divided up; $10,000 each for Holland, Payton and Moore and $3,000 for Elliott. Payton and Moore discussed the fact that Caccavale would definitely die, having taken three shots at close range.

After approximately ten minutes, Holland came to the front room to give Elliott $3,000. Elliott, from his vantage point at the window, then saw Holland appear on the street and remove a suitcase from his car, which he brought back upstairs. It contained a change of clothing for Moore and Payton.

The following morning Elliott called Holland to report that he had read in the newspapers that the man shot dur-

ing the robbery was a police officer and he was dying. Holland replied that it was too bad the dying man was a cop because "it would bring a lot of heat." Caccavale died that day of the injuries resulting from three gunshot wounds.

Shirley Payton, the wife of Richard Payton, testified that the day after his return to Chicago he discussed the facts of the case with her in the presence of their daughter. Shirley then accompanied her husband as he made various bank deposits. About a week or two later she was present when Holland appeared in the Payton's Chicago apartment.

Petitioner Holland's Statement

On June 28, 1976, Holland arrived at the offices of the 17th Homicide Zone pursuant to a police request. Detective George Mergner asked Holland if he had any idea why his telephone number had been placed on the Goldie's van rental agreement by a man with Caryl Thompson's identification. Holland, after responding that anyone with his business card could have so used his telephone number, left the police station.

On July 19, 1976, Shirley Payton, the wife of Richard Payton, called Detective John Daly from Chicago and reported to him that she knew who had killed the police officer during the robbery of the Van Dam Check Cashing. Daly flew out to Chicago that day with an assistant district attorney who taped Shirley Payton's statement. In it, she told Daly that Richard Payton, Percy Moore, Claude Holland and a man named Arthur had committed the crime with a .38 caliber revolver.

Two days later Holland was taken into custody and advised of his rights. After being transported to the precinct Holland was again advised of his rights, this time by Detective Greene. Holland admitted knowing about the Van Dam robbery because Moore and Payton had planned the robbery while staying in his home. He denied being present when the robbery occurred, but admitted meeting Moore and Payton after the robbery and following them to the home of Elliott's mother-in-law where they divided the money. He also admitted that he then drove down Washington Avenue and threw the guns in a sewer in front of a church.

Later that evening Holland gave a taped statement to an assistant district attorney after he was again advised of his rights. He admitted that his acquaintances of 20 years, Payton and Moore, had come from Chicago and stayed at his home for about a month before the incident. Both men had been with him at the Van Dam Check Cashing Company on several Fridays when he went there to cash his check. Three or four weeks prior to the robbery he heard Payton and Moore planning to rob the Van Dam facility. On June 24, 1976, Payton and Moore told him that the robbery was to take place the following morning and that they planned to shoot the man carrying the money so that he would drop his gun. Payton indicated that they were going to rent a van to get to the location and asked Holland where Holland usually rented vans. When Holland told them that he usually rented from Jerry Green at Goldie's Leasing, he was asked to drop his friends off in Long Island City on his way to work. Payton and Moore showed Holland a driver's license, bearing the name of "Carl," which Moore said they had taken from someone in

Brooklyn and which they intended to use to rent the van. They also said that Elliott, who was present during this conversation, could more easily rent the van with the license because he looked a lot like the man in the photo on the identification. Elliott said "Well, maybe" in regard to the license, and also commented that the robbery involved a lot of money and that he needed some. Payton and Moore indicated that they planned to drive to Washington Avenue after the robbery and to be taken to the airport.

At about 7:00 the next morning Holland dropped off Payton and Moore on 21st Street in Long Island City to rent the van. Holland said he did not see either of the men again that day. Payton later told Holland that Moore panicked and fired a number of times because the initial shot he fired into the victim's shoulder didn't stop the man, who continued to raise his gun to retaliate. Holland called Payton on June 27th to tell him the man who died was a police officer. Payton told Holland they got about $33,000 in the robbery and gave Elliott $3,000 for picking them up on Washington Avenue in Brooklyn and driving them to the airport. On July 17th Holland requested money from Moore for a lawyer because he was being harassed by the police and had been good enough not to give out the information of which he had knowledge.

At the conclusion of the tape when Holland was asked to sign a waiver of rights form, he stated that he wanted a lawyer. At about 11:45 p.m., 20 minutes after the taping ended, Detective John Daly placed a Queens yellow pages directory opened to "Lawyers" on the desk in front of Holland. When Holland asked what it was for, Daly said he brought the directory because Holland wanted to see an

attorney. Daly testified that Holland's response was "I don't really want a laywer, I am going to get one in Court". Daly then informed Holland that he was entitled to a lawyer at that time because Daly wished to ask him more questions. According to Daly, Holland repeated that he would get a lawyer in court.

Daly testified that he read Holland his rights and told him that he thought he had lied during the taped interrogation. Holland dropped his dead down and said "Now I'm going to get involved." Holland admitted receiving a $10,000 share of the robbery proceeds, putting the murder weapon and Caccavalle's gun into the money bags taken during the robbery, and throwing them all in a sewer on Washington Avenue in front of a church.

The next day, pursuant to Holland's admissions and at Holland's directions, the police recovered two .38 caliber weapons and two canvas bags from a sewer on Washington Avenue.

Payton's Statement

Payton and Moore were arrested in Chicago on July 21, 1976, and each made both oral and transcribed statements to Detective Daly the following morning. Payton stated that about six weeks before the robbery Holland said he wanted Payton and Moore to come to New York because "he had something working" and they could "make a little money". Payton and Moore flew to New York with two revolvers packed in Payton's suitcases. They stayed at Holland's house.

About two weeks before the robbery "Arthur [Elliott]" proposed that they hold up the owner of the Van Dam check cashing facility when he dropped off money either at the Van Dam or at another such facility that he owned. Elliott was supposed to find out the first place at which the owner stopped when he delivered the money. On June 11, 1976, all four men went to the Van Dam with a rented Pepsi van, but Holland called off the planned robbery because the man with the money was carrying a gun concealed under the money bag. They tried again on June 18, but got to the Van Dam too late because they had trouble obtaining an available rental van.

Prior to a third attempt on June 25, Holland and Moore obtained a driver's license from someone in an elevator in a Brooklyn building while Payton waited in the lobby. On June 25 Moore handled the van rental while Payton, who was late, took a cab to New York-New Jersey Freightways and got a ride to the scene with Holland. After Holland left the vicinity, Caccavalle arrived with the money and Moore shot him three times as he kept reaching for his weapon. Moore jumped in the van with the canvas money bag and Payton drove off to the prearranged rendezvous spot, where Holland and Elliott were waiting. Moore and Payton changed clothes. Elliott held onto the money bag with the guns inside, which Holland was later supposed to throw into the Atlantic Ocean. Holland and Elliott left, but Holland returned a few hours later and drove Payton and Moore to Newark Airport. Payton and Moore flew back to Chicago. On July 17 Holland and Elliott went to Payton's home in Chicago. Holland explained that he was trying to get money together from Payton, Moore and Elliott to pay for a lawyer.

Moore's Statement

Moore also told Detective Daly that in May 1976 Holland asked him to come to New York to make some money. He arrived at Holland's with Richard Payton in June. Their original intent was "to take some furs," but this did not prove to be lurcative. They then cased the Van Dam facility once or twice. In order to get identification with which to rent a van, "all four of us" went to a building where Holland and Moore stole identification from a man in an elevator.

On the morning of June 25, Moore went with someone else to rent a van, using the identification previously obtained. Holland, in his car, led Moore, in the rented van, to Van Dam. Payton later joined Moore in the parked van and took over the driver's seat. Holland was not in the area while they waited for the man with the money. When Caccavale arrived Moore got out of the van and approached him. Moore fired three times as Caccavalle continued to reach for his two weapons. Moore took the money bag and jumped in the van.

Payton drove off toward the expressway, where the two got into Elliott's truck. Holland met them and Elliott drove them to his mother-in-law's house, where all four men counted the money and divided it, $3,000 for Elliott and $10,000 for each of the others. Moore left the money bag and the guns for Elliott because Elliott was supposed to get rid of them. Moore went to the airport in the company of Holland and Payton and returned to Chicago. Moore did not thereafter speak with Holland, but subsequently learned from Payton that the man he had shot was a police officer.

REASON FOR GRANTING THE WRIT OF CERTIORARI

The joint trial of the petitioner and his co-defendants did not constitute a *Bruton* violation, and any possible error was rendered harmless by overwhelming independent evidence.

This Court has long recognized that *Bruton* v. *United States*, 391 U.S. 123, (1968), is inapplicable to those cases where co-defendants confess and their confessions are interlocking. In its plurality opinion in *Parker* v. *Randolph*, 442 U.S. 62 (1979) this Court held that:

> . . . admission of interlocking confessions with proper limiting instructions conforms to the requirements of the Sixth and Fourteenth Amendments of the United States Constitution. *Parker* v. *Randolph*, *supra*, at 75 . . .

since

> . . . the incriminating statements of a co-defendant will *seldom*, if ever, be of the "devastating" character referred to in *Bruton* when the incriminated defendant has admitted his own guilt . . . The possible prejudice resulting from the failure of the jury to follow the trial court's instructions is not so "devastating" or "vital" to the confessing defendant to require departure from the general rule allowing admission of evidence with limiting instructions. *Parker* v. *Randolph*, *supra*, at 73-74 (emphasis added).

Verdict and Sentence

The jury deliberated for an afternoon and an evening and returned with a verdict finding the petitioner and his

co-defendants guilty of felony-murder. On December 14, 1977, the petitioner was sentenced to an indeterminate prison term of 25 years to life (Agresta, J.).

These principles lead inexorably to the conclusion that the petitioner has not overcome the burden he must meet to demonstrate an entitlement of a severance. An examination of the interlocking nature of all three confessions in the case at bar, as well as the wealth of independent evidence proving the guilt of the petitioner, reveals that this was not an exceptional case requiring severance as a matter of federal constitutional law.

In their confessions, Clause Holland, Percy Moore and Richard Payton each revealed the details of the planning of the robbery. Moore and Payton both admitted arriving in New York from Chicago in late May or early June to stay with their friend Claude Holland and "make some money," Payton confessing that he brought two revolvers with him. Holland similarly admitted that the two men stayed at his home during that period of time. Each man confessed to being privy to the discussions which focused on robbing the Van Dam check cashing facility; in fact, Holland admitted that the location was chosen since he cashed his check there, and the day settled upon for the robbery was Friday, the day Holland cashed his check.

All three admitted having gone to the Van Dam location together on several occasions before the day of the shooting. Moreover, each referred to the robbery of Caryl Thompson the day before the crime as part of the scheme to obtain identification for the van rental. Although not specifically admitting his culpable involvement in the plan-

ning and carrying out of the Thompson robbery, the petitioner's statement demonstrated detailed knowledge of this robbery including the type of identification stolen, the borough of the robbery, and the first name of the victim.

All the statements also included the information that $33,000 was taken, the proceeds divided up at Arthur Elliott's mother-in-law's house on Washington Avenue in Brooklyn, with petitioner, Payton and Moore presented each receiving $10,000, as well as Payton and Moore's escape to Chicago by plane. The petitioner admitted knowing the precise amount of money given to Arthur Elliott as well as the specifics concerning the house where the money money was divided. Payton's and Moore's confessions referred to a plan to dispose of the guns and the money bags, although they did not know specifically how this had been done. It was Holland who supplied the police with the location of the sewer where he admitted having disposed of the murder weapon and the money bags.

Although it is true that petitioner never directly admitted that he intended with the others to rob the check-cashing store, his admission of full knowledge of all details in advance of the crime establishes his culpability. Further, he admitted he was made privy to all details of the crime immediately after its occurrence, an unlikely event had he not been understood to be a full participant. Finally, petitioner admitted he had received a share of the proceeds equal to that received by Payton and Moore, the actual robbers. Elliott, on the other hand, received a substantially lesser amount for his help with side details. The only inference to be drawn from this admission is that petitioner was deemed an equal participant with Payton and Moore.

It is clear, therefore, that the confession of the petitioner, Payton and Moore interlock with and are supportive of each other on the essential details of the planning, execution and escape from the murder-robbery in question. Although no two confessions can be exactly identical, it is sufficient if they "interlock . . . on vital points to indicate a common genesis . . . [and] are substantially the same and consistent on the major elements of the crime involved" *United States ex rel. Stanbridge* v. *Zelker*, 514 F.2d 45 (2d Cir. 1975), *cert. den.*, 432 U.S. 872. Confessions have been considered to be interlocking if "[a]s to motive, plot and execution of the crime they are essentially the same" [*United States ex rel. Ortiz* v. *Fritz*, 476 F.2d 37, 39 (2d Cir. 1973), *cert. den.*, 414 U.S. 1075], as were the three confessions at the petitioner's trial.

The trial court's decision that severance was not warranted was entirely proper, since *Bruton* is inapplicable. There was no "devastating" prejudice to the petitioner and he cannot demonstrate such on the record. Furthermore, the limiting instructions, repeated *ad infinitum* by the trial court, were sufficient to safeguard the petitioner's right to a fair trial. Therefore, the People believe that the Court of Appeals was in error when it held that a *Bruton* violation existed. (79a).

Even if the petitioner's statements do not qualify as interlocking with those of the co-defendants', the Magistrate, and consequently the District Court, properly ruled their admission at the petitioner's trial constituted harmless error beyond a reasonable doubt because in light of the other overwhelming evidence against him independent

of the confessions the error did not contribute to the verdict. *Chapman* v. *California*, 376 U.S. 18, 24 (1967). (39a-43a).

The Court of Appeals held that the Magistrate misapplied the harmless error analysis that this Court enunciated in *Schneble* v. *Florida*, 405 U.S. 427, 432 (1972) and recently reaffirmed in *Delaware* v. *Van Arsdall*, 54 U.S.L.W. 4347 (S. Ct. April 7, 1986). The Court of Appeals went on to find that the *Bruton* error herein was not harmless. (85a). The People submit that decision was also incorrect.

The fact is that the Magistrate quoted the test of *Harrington* v. *California*, 395 U.S. 250, 254 (1969) that the "probable impact of the [inadmissible] confessions on the minds of the average jury "must be evaluated and the court must determine whether" the 'minds of the average jury' would not have found the State's case significantly less persuasive [absent the improper evidence] "citing *Schneble* v. *Florida*, *supra*, 405 U.S. at 432 (Petitioner's Appendix). Therefore, the Magistrate did accept the analysis of *Schneble*, but rejected an absurd interpretation and literal reading of its test that "there is a reasonable possibility that the improperly admitted [confessions] contributed to the conviction". *Schneble* v. *Florida*, *supra*, 405 U.S. at 432. The Magistrate quoted from the Second Circuit in *Hawkins* v. *LeFevre*, 758 F.2d 866, 877 (1985) cautioning that an appellate court could almost always find some possibility that the error influenced the verdict. Again the Magistrate's decision is not rejection of the test, but only a refusal to carry it to an absurd extent as the Court of Appeals did in their opinion. The Magistrate properly applied *Chapman* and its progeny in the instant petition and arrived at the correct conclusion.

More importantly, when the factors of harmless error analysis of *Chapman*, as restated in *Delaware* v. *Van Arsdall*, are applied to the facts herein, this Court should find that the error, if any, was harmless. The analysis depends on a host of factors including (1) the importance of the testimony to the People's case, (2) whether the testimony was cumulative, the presence or absence of corroborating or contradicting evidence, extent of cross-examination and overall strength of the prosecution's case. *Delaware* v. *Van Arsdall*, 54 U.S.L.W. *supra* at 4350.

In the instant case the testimony of Arthur Elliott, the petitioner's partner in crime, was sufficient in itself to establish the petitioner's individual culpability for felony murder had he been tried separately. His testimony unequivocally demonstrated the involvement of the petitioner in the planning of the crime, its execution, and its aftermath. Moreover, Elliott places the petitioner as the mastermind of the plot, the man who had Payton and Moore living with him for the very purpose of robbery and who was intimately involved in the obtaining of identification in order to allow his confederates to rent the van prior to the homicide. Elliott's testimony, which points to the central nature of the petitioner's role is lent tremendous support by the petitioner's own statement, wherein he admits that the plotting took place at his house and that his suggestions as to the location of the robbery and the rental of the van were the very ones acted upon. It is Elliott's testimony which establishes that the petitioner was at the rendezvous point after the robbery, that he followed Elliott, Payton and Moore to Brooklyn, and that he was the man who handed Elliott his share of the proceeds, and that the petitioner's complicity extended to providing Payton and

Moore with a change of clothes as well as driving them to the airport.

This testimony made the confessions of petitioner's co-defendant cumulative and unnecessary to the prosecutor's case against the petitioner. Further, Elliott's credibility was tested by cross-examination by all three defendants and it was revealed to the jury that prior to his testimony he had pled guilty to robbery in the first degree and would be sentenced to 10 years in prison.

Elliott's testimony, naming petitioner as an active participant in the robbery-murder was corroborated by testimony of Caryl Thompson, who positively identified the petitioner as one of the two men who robbed him of his wallet and identification at gunpoint on the day before the murder and thereby obtained the identification needed to rent the van used in the course of the robbery-shooting. Thompson's testimony independently shows the petitioner's culpability as well as supports the credibility of Elliott's testimony. Thompson's testimony sufficed, when coupled with petitioner's own confession, to prove the petitioner's guilt in the felony murder.

The Court of Appeals improperly dismissed out-of-hand the testimony of Elliott and labeled Thompson's identification of petitioner as participant in the first robbery as merely circumstantial evidence of petitioner's participation in the felony murder (84a).

The court painted Elliott as a co-conspirator who was selling his testimony for an easy plea. In fact, Elliott pled guilty to robbery in the first degree and received a sentence

of ten years, not an insignificant sentence considering his culpability was less than any of the other defendants. The court also ignored the importance of the robbery of Thompson's identification to the execution of the plan to rob the check cashing facility. Furthermore, the court failed to recognize that Thompson and Elliott's testimony corroborated each others credibility.

In short, in the face of petitioner's confession and the testimony of Elliott and Thompson, the "minds of an average jury" would not have found the case against the petitioner significantly less persuasive had the co-defendants' statements been excluded; therefore any possible *Bruton* error was harmless. *Schneble* v. *Flordia, supra,* 405 U.S. at 432.

Assuming that this Court does not find the confession interlocking under *Bruton,* the co-defendants' admissions would still have been admissible under this Court's recent decision in *Lee* v. *Illinois,* 54 U.S.L.W. 4555 (June 3, 1986). In *Lee* this Court held that if the presumptive unreliability inherent in a co-defendant's confession can be rebutted by an "indicia of reliability" it may be admitted into evidence against the defendant as an exception to the hearsay rule. *Lee* v. *Illinois, supra* at 4559, citing *Ohio* v. *Roberts* 448 U.S. 56, 66 (1980).

The majority reasoned that the additional trustworthiness could be established if the confessions interlocked or if circumstances surrounding the co-defendant's confession increased its credibility, however the Court found neither condition existed.

The minority, on the other hand, reasoned that the additional reliability was established because the co-defendant's confession was a statement against penal interest. *Lee* v. *Illinois, supra* at 4562 (Blackmun, J. dissenting). The minority found that the hearsay exception was established because the co-defendant was unavailable to testify and his statement was in all respects against his own interest. In addition, the minority found that the co-defendant's statement in no way diminished his own culpability.

All of the above conditions exist in the instant case to admit the confession as statements against penal interest. Co-defendants were unavailable to testify; by their statements they admitted being the two who actually executed the robbery and fired the fatal shots; finally by naming the petitioner as the planner they did not diminish their own liability. Furthermore, the facts in the instant case are even stronger than those in *Lee* because in the instant case the reliability of the co-defendants' confessions are corroborated by the testimony of Elliott and Thompson. Therefore an independent basis for the reliability of the co-defendants' confession having been established they were properly admitted at petitioner's trial.

In sum the decision of the Court of Appeals, remanding the matter to the district court to grant the *habeas corpus* writ was incorrect because the co-defendant's confessions interlock with petitioner's and there was no *Bruton* error; or the error if it existed was harmless; and, finally the co-defendants' confessions were admissible as statements against penal interest.

CONCLUSION

For the foregoing reasons, a petition for certiorari should issue to review the judgment of the Second Circuit.

Respectfully submitted,

JOHN J. SANTUCCI
District Attorney
Queens County

WILLIAM SCHRAGER
RAY F. CERRETA
Assistant District Attorneys
of Counsel

July, 1986

APPENDICES

Decision of the State Supreme Court, Queens County (Agresta, J.) 10/14/77

SUPREME COURT—STATE OF NEW YORK
CRIMINAL TERM PART 3 QUEENS COUNTY
125-01 Queens Boulevard
Kew Gardens, N. Y.

PRESENT:
HON. THOMAS S. AGRESTA
Justice.

THE PEOPLE OF THE STATE OF NEW YORK,

against

CLAUDE HOLLAND, ARTHUR A. ELLIOTT, PERCY MOORE & RICHARD PAYTON,

Defendants.

Ind. No. 1700/76

Motion	
Submitted	197
Argued	197
Hearing	197

WADE, HUNTLEY & BRUTON
PAUL RUBENFELD for def. HOLLAND

ABRAHAM WERFEL for def. ELLIOTT

SPIROS TSIMBINOS for def. MOORE

RONALD RUBINSTEIN for def. PAYTON
For the Motion

JOHN J. SANTUCCI, D.A.
Opposed

The following papers numbered 1 to ... submitted in this motion.

	Papers Numbered
Notice of Motion and Affidavits Annexed	.....
Answering and Reply Affidavits	.....
Exhibits	.....
Minutes	.....
Other	.....

After a hearing, in the opinion of the Court, the defendants' motions are granted to the extent indicated in the accompanying memorandum, dated October 14, 1977.

GRANTED:

Date: October 14, 1977

JOHN J. DUARANTE

/s/ THOMAS S. AGRESTA

THOMAS S. AGRESTA, J.S.C.

MEMORANDUM

SUPREME COURT, QUEENS COUNTY
CRIMINAL TERM, PART 3

BY THOMAS S. AGRESTA, J.

DATED October 14, 1977

Ind. No. 1700/76

THE PEOPLE OF THE STATE OF NEW YORK,

against

CLAUDE HOLLAND, ARTHUR A. ELLIOTT, PERCY MOORE & RICHARD PAYTON,

Defendants.

All the above named defendants move for separate trials and for the suppression of physical evidence and admissions allegedly made by them.

The defendants, CLAUDE HOLLAND and PERCY MOORE, in addition move to suppress identification testimony and the defendant, RICHARD PAYTON moves to suppress statements made by SHIRLEY PAYTON.

The defendants are charged with two counts of Murder in the second degree, one count of Robbery in the first degree and one count of Criminal Possession of a Weapon in the second degree.

A hearing was held on September 20, 21, 23, 27, 28, 29, 30th and on October 3 and 4, 1977. Based on the evidence

adduced at the hearing, the court makes the following findings of fact and reaches the following conclusions of law.

On June 25, 1976, GEORGE CACCAVALE was robbed and killed while delivering cash to The Van Dam Checking Offices in Long Island City, New York. Two males were observed immediately prior to the incident by DEMARY ALICEA in a truck parked close by the check cashing facility. One of these men was later identified by her through photographs as defendant, PERCY MOORE. The van truck later abandoned, was rented from GOLDIE LEASING CORPORATION under a rental agreement, by a person who identified himself as CARYL THOMPSON, who used a Brooklyn address and gave the telephone number of the defendant, CLAUDE HOLLAND. CLAUDE HOLLAND was questioned on the 28th day of June, 1976 by police and admitted that the telephone number was his, but denied any knowledge as to the identity of the person who leased the truck and gave that telephone number.

CARYL THOMPSON was robbed at gun point on June 24, 1976, at which time his wallet was taken which contained his driver's license and registration. He reported the incident to the police and aided an artist in preparing a composite sketch of one of the robbers which sketch is a fair likeness of the defendant, CLAUDE HOLLAND. He also made an identification at the Brooklyn Criminal Court of CLAUDE HOLLAND as one of the perpetrators who robbed him. New York City Police Detective Daly communicated with Chicago police to ascertain the identity of associates of Claude Holland, who originally resided in Chicago. In response to a call from SHIRLEY PAYTON, Detective Daly contacted her on July 19, 1976. She identified herself as the wife of the defendant, RICHARD PAYTON and named those

involved in the New York City check cashing homicide and robbery as CLAUDE HOLLAND, PERCY MOORE and RICHARD PAYTON and a fourth person, who had been referred to as ARTHUR. Her statement to Detective Daly further revealed the amount of money taken in the robbery and its approximate distribtuion among the defendants. She further related that on the 18th day of June, 1976 she called RICHARD PAYTON at the home of CLAUDE HOLLAND. That the next day she received a call from RICHARD PAYTON and as a result of that call, went to New York where she met with RICHARD PAYTON.

Upon receiving this information, Detective Daly advised his New York office to pick up defendants, CLAUDE HOLLAND and ARTHUR ELLIOTT for questioning, both of whom were brought in by police on July 20, 1977.

CLAUDE HOLLAND was confronted with the information obtained by Detective Daly and gave a statement which was tape recorded. His statement identified PERCY MOORE and RICHARD PAYTON as two of the perpetrators, but did not implicate himself. He subsequently gave a further oral statement which revealed his part in the robbery and how he disposed of the two weapons given him by PERCY MOORE on the same day of the robbery, the amount of money taken and how distribution was made. RICHARD PAYTON, PERCY MOORE and CLAUDE HOLLAND, each received $10,000.00. ARTHUR ELLIOTT received $3,000.00. He later showed police the sewer wherein he had thrown the two weapons and the canvas bag in which the money was carried by the deceased, GEORGE CACCAVALE.

On the 21st day of July, 1976, Detective Daly had a leads message forwarded to the Chicago Police Authorities requesting that RICHARD PAYTON and PERCY MOORE be taken

into custody for the New York robbery and homicide. Both RICHARD PAYTON and PERCY MOORE were picked up by the Chicago Police on the 21st day of July, 1976 and were held for the arrival of Detective Daly. On the following day, Detective Daly arrived in Chicago and questioned both defendants, who made substantially similar statements which were recorded. The statements recited their personal involvement in the robbery and homicide, the manner of flight, distribution of the proceeds of the robbery and indicated as well the roles of CLAUDE HOLLAND and ARTHUR ELLIOTT. The statement of PERCY MOORE briefly alluded to an unrelated fur robbery. Arrest warrants arrived in Chicago in the afternoon of July 22, 1976. Both RICHARD PAYTON and PERCY MOORE were brought before the court where each waived extradition to New York. They were returned to New York on the 23rd day of July, 1976, where they were charged with the crimes of robbery, homicide, and criminal possession of a weapon.

ARTHUR ELLIOTT, when confronted with the incriminating statement made by CLAUDE HOLLAND on the 21st day of July, 1976, made certain admissions which were tape recorded. These admissions which reveal his involvement in the robbery and homicide are almost identical with his role as depicted in the statement of CLAUDE HOLLAND. An additional statement was elicited from PERCY MOORE after an attorney had appeared on his behalf.

AS TO THE HUNTLEY HEARING

The defendants, PERCY MOORE and RICHARD PAYTON contend that their arrest in Chicago was illegal on the ground that at the time of their arrest no arrest warrant was issued, nor did the police have probable cause for such

arrest. They further contend that under the rationale of BROWN vs. ILL. 422 U.S. 590, any confessions made subsequent to the illegal arrest should be surpressed as tainted. The defendants rely in part on the fact that the information furnished to Detective Daly by SHIRLEY PAYTON was derived from a priviledged communication made by RICHARD PAYTON to her. That such a statement is inadmissable as to RICHARD PAYTON, or any of the other defendants. On June 25, 1976, SHIRLEY PAYTON and her brother-in-law met RICHARD PAYTON at O'Hare Airport in Chicago. The following morning, in the presence of his step-daughter, a girl of fourteen years of age, RICHARD PAYTON revealed the facts and circumstances of the homicide and robbery, which took place in Long Island City, New York. SHIRLEY PAYTON had received a telephone call sometime in the latter part of May or early June of 1976 from CLAUDE HOLLAND and she herself had called the home of CLAUDE HOLLAND in June of 1976. She also accompanied her husband to a bank where part of the proceeds of the robbery were deposited after the robbery.

Under these circumstances, the court finds that the communication by RICHARD PAYTON to SHIRLEY PAYTON was not priviledged, since it was made in the presence of a third party, to wit; his fourteen year old step-daughter. (PEOPLE vs. MELSKI, 10 N.Y.2d 72).

The court further finds that any such information obtained by Detective Daly could be used by the police in their investigation of the homicide and robbery, irrespective of whether it was priviledged or not.

Nor is there any proof that the police illegally detained CLAUDE HOLLAND, as he had been a suspect from the beginning of the police investigation, as a result of his telephone number appearing on the truck rental agreement, the com-

posite drawing, as well as the information obtained by Detective Daly from SHIRLEY PAYTON.

These facts when taken together with the admissions made by CLAUDE HOLLAND, were more than sufficient to justify the police action taken regarding the subject arrests.

The defendants contend that their admissions were obtained by coercion, duress and force. Defendants, RICHARD PAYTON and PERCY MOORE were taken into custody by the Chicago Police late in the evening of July 21, 1976 and taken to a police precinct where they were held in separate interview rooms until Detective Daly from the New York City Police Department arrived on the following day. The general area in which they were held constituted a number of interview rooms, each of which had a three foot chain connected to a ring on the wall. Each chain in turn was connected to a single handcuff. The defendants were placed in separate rooms and handcuffed to such a chain. Chairs and benches were placed near each handcuffed person so that he could sit or sleep. The rooms in question had no bars or cell like appearance. The defendants PERCY MOORE and RICHARD PAYTON contend that the manner in which they were held constituted cruel and inhuman treatment and was sufficiently coercive to force their admissions. They further contend that neither defendant was fed from the time they were taken into custody until the time their admissions were made. The court finds from the creditable evidence adduced at the trial that each of the defendants was offered food and drink and that PERCY MOORE, a diabetic was provided with the necessary medication. Neither of the defendants complained of any ill treatment received while they were in custody, nor is there evidence sufficient to find their admissions were the result of the manner in which they were held in custody or the result of coercion.

The court therefore finds that the defendants were properly advised of their constitutional rights as set forth in "Miranda", that they understood the nature of these rights, that they knowingly and intelligently waived those rights and voluntarily made the subject admissions.

The court however finds that a reference was made to an unrelated fur robbery in the PERCY MOORE confession, which reference, unless redacted, would be highly prejudicial. The court further finds that the statement made by PERCY MOORE on August 3, 1976 was made after counsel had appeared on his behalf and that this statement should be surpressed.

AS TO THE WADE HEARING

CARLY THOMPSON assisted the police in the preparation of a composite drawing of the man who robbed him at gun point on June 25, 1976. He also previously identified CLAUDE HOLLAND in the Brooklyn Criminal Court as the perpetrator of that crime.

DEMARY ALICEA, an employee of The Van Dam Checking Office in Long Island City, New York was present at the time the robbery and homicide took place on June 25, 1976. She had observed two males sitting in a van adjacent to the premises. She gave police authorities a description of one of the individuals and subsequently made a photo identification of the defendant, PERCY MOORE, as one of the persons she had observed at that time.

CHARLES BATES, a relative of CLAUDE HOLLAND, met two male persons at the home of CLAUDE HOLLAND in June of 1976. He had been in their company for a period of approximately one and a half hours and subsequently he made a photo identification of the defendants, PERCY MOORE and RICHARD PAYTON as being the same individuals present in the house at that time.

GERALD GREEN, owner of the GOLDIE LEASING CORP. rented a Van Truck to a man who identified himself as CARYL THOMPSON on the morning of June 25, 1976. He gave police a description of the man later that day. He also identified PERCY MOORE from an array of six photographs as the man who rented the van.

Each of the foregoing witnesses made an in court identification of the respective defendants at this hearing.

The court finds that the in court identification[s] of the defendants were not tainted or suggestive by reason of the exhibition of photographs or by the prior in court identification of CLAUDE HOLLAND by CARYL THOMPSON at the Brooklyn Criminal Court.

The court, in addition finds that the in court identification of the defendants to be a product of the independent observations of the witnesses, based upon their recollection of the events at the time they initially confronted the defendants.

AS TO THE SUPPRESSION OF PHYSICAL EVIDENCE

The court finds that the contentions of the defendants that the physical evidence should be suppressed to be unfounded. This evidence was obtained as the result of the voluntary disclosure of the location of the guns and canvas bag by CLAUDE HOLLAND who when so far as to physically point out with great particularity, their location.

AS TO THE REQUEST FOR SEPARATE TRIALS

In moving for severance, counsel for the defendants rely upon the case of BRUTON VS. UNITED STATES 391 U.S. 123 a case involving joint trials in which only one of the defendants confessed implicating the others.

In the instant matter, each of the defendants made a voluntary confession, implicating themselves, as well as their co-defendants. Furthermore, their respective confessions interlock and are supportive insofar as here pertinent.

Under such circumstances, our courts have held that BRUTON does not apply (PEOPLE v. MC NEIL 24 N.Y. at 550) (People vs. Galloway 24 N.Y.2d 935).

Based upon the foregoing, the court finds that separate trials would serve no purpose, other than to impose an unwarranted burden on the administration of justice.

Accordingly, the defendants' motions for the suppression of admissions and confessions allegedly made by them is granted to the extent that the statement made by PERCY MOORE on August 3, 1976 after counsel had been retained is suppressed and the statement alluding to the Brooklyn fur robbery contained in the confession of PERCY MOORE is redacted.

The defendants' motions for the suppression of admissions and confessions is in all other respects denied.

The balance of the defendants' motions for the suppression of identification testimony, the suppression of physical evidence and for a severance is denied.

Order entered accordingly.

The clerk of the court is directed to mail a copy of this decision and the order to be entered thereon to the attorneys for the defendants.

/S/ THOMAS S. AGRESTA, J.S.C.

THOMAS S. AGRESTA, J.S.C.

Report and Recommendation of the United States Magistrate, Michael H. Dolinger 9/5/85

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

84 Civ. 106 (CES)

CLAUDE HOLLAND,

Petitioner.

against

C.J. SCULLY, Warden, Green Haven Correctional Facility, and ROBERT ABRAMS, Attorney General of the State of New York,

Respondents.

TO THE HONORABLE CHARLES E. STEWART, JR., U.S.D.J.:

Claude Holland petitions for a writ of habeas corpus from his 1977 New York State conviction for felony murder. For the reasons that follow, I conclude that this Court is barred by the "procedural default" rule of *Wainwright* v. *Sykes*, 433 U.S. 72 (1977), from considering one of petitioner's three claims, and I recommend that the remaining two claims be denied on the merits.

A. *Petitioner's Claims in this Proceeding*

On November 16, 1977, following a three-week jury trial, petitioner and two co-defendants were convicted of felony murder. On December 14, 1977, he was sentenced to a term of imprisonment of twenty-five years to life.

Petitioner presently asserts three grounds to set aside the conviction. First, he claims that the denial of his pre-trial motion to sever and the admission of inculpatory statements by two of his non-testifying codefendants violated his Sixth Amendment right to confrontation under *Bruton* v. *United States*, 391 U.S. 123 (1968), and its progeny. Second, he argues that the admission of one of his own inculpatory statements violated his Fifth Amendment right against self-incrimination since it had been elicited from him after he had indicated that he wished to have an attorney. Third, he claims that the trial court's supplemental jury instructions denied him due process because they effectively removed the issue of intent from the jury's consideration.*

B. *Statement of Facts*

1. *Pre-Trial Proceedings*

Petitioner and three other men—Percy Moore, Richard Payton, and Arthur Elliott—were originally indicted for first-degree murder,** felony murder,† robbery in the first degree‡ and possession of a weapon.¶ The charges stemmed from the shooting death of George Caccavalle, an off-duty transit patrolman, during the course of a June 25, 1976 robbery at the Van Dam check-cashing office in Queens, New York.

* By his original *pro se* petition, petitioner asserted only the *Bruton* claim. After appointment of counsel, he filed an amended pleading, which raised the two additional claims.

** *See* N.Y. Penal Law § 125.27 (McKinney's 1975).

† *See* N.Y. Penal Law § 125.25(3) (McKinney's 1975).

‡ *See* N.Y. Penal Law § 160.15 (McKinney's 1975).

¶ *See* Penal Law §§ 265.01-04 (McKinney's 1980).

Prior to trial all four defendants moved for separate trials under *Bruton* because the State had obtained and intended to introduce inculpatory statements from each of them. In addition, defendants all moved to suppress their own statements as having been taken in violation of *Miranda* v. *Arizona*, 384 U.S. 436 (1966).*

Following nine days of testimony, the presiding State Supreme Court Justice, the Honorable Thomas Agresta, denied the pre-trial motions insofar as they sought separate trials, holding that severance was not required since each of the defendants had made statements implicating themselves as well as their fellow defendants. (*See People* v. *Holland*, No. 1700-76, Memorandum at 9 (Sup. Ct., Queens Cty., October 14, 1977).) With respect to the motions to suppress the confessions, the Court granted the motion as to one statement made by defendant Moore after counsel had appeared on his behalf, but denied the motions as to all other statements. In so doing the Court found that each of the defendants had been given his *Miranda* warnings prior to having made their statements. (*Id.* at 7, 10.)

2. *The Trial and Sentence*

Following pre-trial hearings, but before trial, Elliott pled guilty to robbery in the first degree and agreed to testify at trial on behalf of the State. Holland, Moore and

* Three of the defendants—including Holland—sought additional miscellaneous relief suppressing certain physical evidence and statements made by the wife of defendant Payton. In addition Holland and Moore sought to suppress identification testimony by the victim of a robbery that occurred one day before the shooting at the Van Dam office. (*See* Memorandum dated October 14, 1977 at p. 1 (Sup. Ct. Queens Cty.).)

Payton were tried together, and all three were found guilty of felony murder* by a jury on November 16, 1977, after a three-week trial. On December 14, 1977, petitioner and Moore were sentenced to twenty-five years to life, while Payton was sentenced to twenty years to life. Elliott received a ten-year sentence on his plea of guilty to robbery in the first degree.

3. *The Evidence At Trial*

a. *Summary of The Government's Case*

Wholly apart from the confessions of Moore and Payton, the Government introduced extensive evidence at trial to demonstrate the involvement of each of the three remaining defendants—Holland, Moore and Payton—in the June 25, 1976 robbery. In summary, the evidence showed that in May 1976 Moore and Payton—who were old acquaintances of Holland—travelled from their hometown Chicago to New York, where they moved in with Holland until the day of the robbery, which occurred approximately one month later. During that time Holland and his two friends together visited the Van Dam check-cashing office on several occasions.

On the day before the Van Dam robbery, Holland and Moore held up another man, named Caryl Thompson, in Mr. Thompson's building elevator, and took his wallet, including driver's license and other identification. That same evening, the three defendants invited Elliott—a coworker of Holland—to join them in robbing the Van Dam office the next day. As his part of the arrangement, Elliott agreed to drive Moore and Payton away from the vicinity

* Only the felony murder and robbery counts were submitted to the jury.

of the Van Dam office after they had completed the robbery; in exchange, he was to receive a share of the proceeds. Holland was also supposed to be in the area in another vehicle. Although he was not to participate in the actual robbery, he was to assist in getting Moore and Payton to the airport after it was completed and the money divided.

The next morning Holland dropped Moore off near a car rental office in Long Island City. Moore rented a van, using the identification papers that Holland and he had stolen from Thompson. He and Payton then drove to the Van Dam office, where Moore robbed and fatally shot Caccavalle as he was delivering money to the office. Moore and Payton then drove a short distance away in the rented van, before they abandoned it and entered Elliott's truck. Elliott and Holland, who was waiting nearby, then drove to the home of Elliott's mother-in-law, where the four men divided the loot—Elliott receiving $3,000 and the other three each taking $10,000.

Holland then supplied Moore and Payton with a change of clothing, drove them to the airport and finally disposed of the money bags and guns in a sewer in front of a church. Moore and Payton both returned to Chicago.

b. *Eyewitness Testimony Offered by the Government*

The following testimony, independent of the defendants' admissions, was adduced at trial.

Payton's wife and daughter both testified that Payton had left Chicago to go to New York on May 25, 1976 with at least one gun in his suitcase. (Tr. V: 58, 115.)* Pay-

* References to the trial transcript will be designated "(Tr.)" with the volume (as indicated by red Roman numerals on the front of each volume) and page inserted.

ton's wife also testified that on June 20, 1976, while in New York, she saw her husband at Holland's apartment with Holland and Moore. (Tr. V: 132-33.) She did not see Payton in Chicago again until she went to pick him up from the airport on June 25, 1976, the day of the Van Dam robbery. (Tr. V: 116-18.)

Caryl Thompson testified that on the afternoon of June 24, 1976—one day before the Van Dam robbery—he had been robbed at gunpoint in the elevator of his building in Brooklyn by two men, one of whom he identified as Holland. (Tr. I: 139-45.) According to Thompson, Holland took his wallet, including his driver's license and other identification. (Tr. I: 145, 149-50.)

Gerald Green, the owner of Goldie's Leasing Corporation, testified that on a number of occasions Holland had rented trucks from him. (Tr. I: 397.) Green reported that on the morning of June 25, 1976 at approximately 7:30 A.M. he rented a van to a man whom he identified at trial as Moore. (Tr. I: 390-91.) Moore gave his name as Caryl G. Thompson, using Thompson's driver's license, and provided a telephone number that was subsequently determined to be Holland's. (Tr. I: 392, 471-73, 499.)

DeMary and Amilcar Alicea—both of whom were employed by Van Dam—as well as a number of Van Dam customers testified as to the events that occurred at the check-cashing facility on the day of the robbery. The Aliceas arrived at work at about 9:00 A.M. by which time a number of customers were already waiting outside the facility. (Tr. I: 78-80, 212-14, 279-82, 285; II: 365; III: 642, 644.) While Mr. Alicea opened the store, Mrs. Alicea kept watch in the street. (Tr. I: 217-19, 284-85; III: 643-44.) She observed a red Goldie's van parked near the store and a

man sitting in the van whom she identified as Moore. (Tr. I: 286-91, 305-06.) Three other people also testified to having seen the van parked outside Van Dam Check Cashing, with one or two men sitting in it. (Tr. I: 79, 82-84, 214-17, 227-28, 231-32; II: 364, 369-70, 373.)*

Shortly after the store opened, George Caccavalle, an off-duty transit policeman who regularly delivered the cash payroll to the check cashing facility, arrived with the week's cash. As he was carrying the money in a canvas bag from his car to the store, three or four shots were fired, Caccavalle fell to the ground, a gunman took the canvas bag and entered the red Goldie's van, which then drove off. (Tr. I: 84-87, 114-15, 222-24, 293-95; II: 368-69, 372, 374-80; III: 647-49).

The most damaging eyewitness evidence implicating Holland—other than Holland's own inculpatory statements—was provided by Arthur Elliott. Elliott, who had pled guilty and would later receive a ten-year sentence for his part in the robbery, testified that Holland was a friend whom he knew from work. (Tr. IV: 856-59.) According to Elliott, after work on June 24, 1976, he went to Holland's apartment. Holland, Moore, and Payton were at the apartment, and the four of them entered into a conversation. (Tr. IV: 860-62.) During the discussion, Holland told Elliott that he and his compatriots were planning to rob the Van Dam check-cashing office, and he asked Elliott whether he wanted to make some money. (Tr. IV: 863, 870.) Elliott agreed. The plan called for Elliott to take his truck and pick up Moore and Payton at 9:00 A.M. the next morning at a designated rendezvous point. Holland

* Mr. Alicea also testified that he saw a red van, although he did not indicate whether there were markings on it or not. (Tr. III: 645.)

was also to meet them in his own car. (Tr. IV: 864-66.) As explained by the three men, Moore and Payton were going to lease a van from Goldie's Leasing for use in the robbery, using another person's driver's license, which they had already obtained. (Tr. IV: 867-69.)

The next morning Elliott drove his truck to the designated rendezvous point, arriving at 9:00 A.M. Tr. IV: 865, 951-52.) Elliott observed Holland sitting in his parked car about a half block away and waved to acknowledge his presence. (Tr. IV: 865-67.) Approximately five to seven minutes later, Moore and Payton arrived in a red Goldie's van. Tr. IV: 866-67, 870.) They transferred from the van to Elliott's truck, carrying what appeared to be a money bag. (Tr. IV: 870-72.) Elliott then drove to his mother-in-law's house, with Holland following in his own car. (Tr. IV: 872-73.)

All four men entered the house and went upstairs. Elliott stayed in one room keeping watch out of the window while the other three were in another room counting the money. (Tr. IV: 874, 947-48.) Approximately ten minutes later, Holland informed Elliott that the robbery had netted $33,000 and gave Elliott $3,000 from the haul. Holland, Moore and Payton each received $10,000. (Tr. IV: 875, 948-49, 958.)

At some point Holland went to his car, retrieved a suitcase, and brought it back into the house. The suitcase contained changes of clothing for Moore and Payton. (Tr. IV: 875-76.) Elliott then departed, but the plan contemplated that Holland would subsequently take Moore and Payton to the airport for their flight home. (Tr. IV: 877-78.)

The next morning, after reading a newspaper story about the robbery, Elliott telephoned Holland to report that

the person shot in the robbery was a police officer and that he was dying. Holland responded that he was "sorry it was a cop, it [is] going to bring a lot of heat." (Tr. IV: 879-80.)

c. *Holland's Inculpatory Statements*

The State presented a number of law enforcement witnesses to document a series of inculpatory statements made by Holland during the course of their investigation. These included an initial oral statement to the poilce, a taped statement made to an Assistant District Attorney and police, and a subsequent oral statement made to still another policeman.

Holland was questioned first by the police on June 28, 1976 because his telephone number appeared on the Goldie's rental slip for the van rented by Moore. Holland could not explain why his number was on the slip, although he produced a business card with his number on it, apparently to show that the number was accessible to many people. (Tr. I: 466-73.)

On the evening of July 21, 1976, Holland was arrested at his workplace and advised of his rights. He was then transported to the 114th Precinct, where New York Police Detective Delphin Greene again advised him of his rights. Holland responded that he was willing to answer questions, and Det. Greene then proceeded to question him. (Tr. I: 509-19; II: 15-16, 478-81; III: 591-99). Holland admitted that he knew about the robbery but stated that he "wasn't there when the robbery went down." (Tr. V: 18.) He said that he new about the robbery because "Richard and Percy"—who were from Chicago—had planned it in his presence at his house. (Tr. II: 17-18, 20.) Although he

denied being present at the robbery, Holland admitted that he had met Richard and Percy after the robbery and accompanied them to Elliott's mother-in-law's house, where, according to Det. Greene, "they split up the money." (Tr. II: 17-19, 25.)

Holland also admitted that he had disposed of the guns by throwing them into a sewer in front of a church on Washington Avenue. (Tr. II: 18.) Holland at this point indicated that he was willing to make a statement to an Assistant District Attorney. (Tr. II: 18.)

Later that evening, Holland made a statement to ADA Albert Guadelli which was taped.* At the outset he was again advised of his rights, this time by ADA Gaudelli. He stated that he understood the warnings and that he would answer questions. (CH: 1-2; Tr. II: 259-72.)

In response to a series of questions by Guadelli, Holland stated that his long-time acquaintances, Moore and Payton, had come from Chicago to visit him about a month prior to the robbery and stayed at his house. He reported that the robbery of Van Dam Check Cashing had first been mentioned by Moore and Payton about three or four weeks prior to the robbery. On June 24, 1976, Holland said, Moore and Payton told him that they were planning the robbery for the following morning.** They indicated that they planned to disable the person carrying the money by shooting him so that he would drop his gun. (CH: 2-5.)

---

* The tape was subsequently transcribed. References to the transcript of petitioner's statement will be designated "(CH:)" with the page number inserted. The transcript was received into evidence at trial. (Tr. II: 287.)

** Petitioner stated that Moore and Payton had previously accompanied him several times to cash his checks at Van Dam and that they knew to rob the check-cashing facility on Friday because petitioner cashed his checks there on that day. (CH: 3-5.)

According to Holland, Moore and Payton stated that they wanted to rent a van to use in the holdup and asked Holland where they could obtain one. (CH: 7.) Holland responded that he rented vans from Jerry Green of Goldie's Leasing Corporation, located in Long Island City. (CH: 8.) Moore and Payton then asked Holland to drop them off in Long Island City the next morning on his way to work so that they could rent the van, and Holland agreed to do so. (CH: 6-8.)

During the conversation—at which Elliott was present—Moore told Holland that he and Payton "had took" a license from someone in Brooklyn and were going to use it to rent the van. (CH: 9.) Holland remembered the name on the license as "Carl," although he said that the name Thompson sounded familiar. (CH: 8-9.) Holland further admitted that he in fact did drive Moore and Payton to Long Island City the next morning at 7:00 A.M. so that they could rent the van. (CH: 9-10.)

In his taped statement Holland did not admit any other involvement. However, he did state that Payton later told him that during the robbery Moore had shot Caccavalle a number of times because Caccavalle continued to try to raise his gun. (CH: 5-6.) Holland also reported discussing the robbery with Elliott shortly after it had occurred. During that conversation Elliott indicated that Caccavalle's death was going to "bring a lot of heat." Holland also called Payton on June 27 to tell him that Caccavalle was a police officer. During this conversation, Holland stated, he learned from Payton that they had seized $33,000, and that Elliott had received $3,000 for driving Moore and Payton to the airport. (CH: 11-14.) Finally, on July 17—only four days before his arrest—Holland spoke with

Moore and requested money from him in return for his silence because he was being harassed by the police and needed to get a lawyer. (CH: 14-15.)

At the end of the tape, Holland stated: "my answers I believe [are] correct, you know, but at this time I would like to talk to a lawyer." (CH: 17.) About a half hour later, Police Detective John Daly placed a Yellow Pages directory opened to "Lawyers" in front of petitioner. (Tr. IV: 1014, 1016). According to Daly, Holland asked him what the directory was for, and Daly responded that ADA Gaudelli had told him that Holland wanted a lawyer. Holland then said: "I don't really want a lawyer, I am going to get one in Court." Daly responded that he wanted to ask Holland certain questions and that Holland was entitled to a lawyer. Holland again responded that "I'll get one in Court." (Tr. II: 1016.)

Daly testified that Holland then indicated that he wished to talk, and Daly advised him again of his rights. (Tr. IV: 1017-19.) Daly then told Holland that he believed that he had lied during the taped interrogation. According to Daly, Holland then dropped his head and said, in substance, "Now I'm going to get involved." When Daly then said that he believed Holland had received money from the robbery-homicide, Holland admitted having received a $10,000 share. Holland also admitted that he had placed the murder weapon and Caccavalle's gun into the money bag and had thrown the bag into a sewer in front of a church on Washington Avenue. (Tr. IV: 1020.)*

As Daly and the other witnesses recounted, the police subsequently conducted a search of the sewers in front of a church on Washington Avenue. When they were unable

* This coincided with Holland's earlier statements to Detective Greene. (Tr. IV: 1227.)

to find the bag, Holland was taken to the site and pointed out the specific sewer into which he had thrown the guns and the bag. The following morning, with the assistance of sewer servicemen, the police retrieved the murder weapon, Caccavalle's gun, and the money bag. (Tr. II: 27-28, 145-51, 154, 161-62, 195; III: 412-13, 434-35, 439, 484-85, 488-89.)

d. *The Inculpatory Statments of Holland's Co-Defendants*

Payton and Moore were arrested in Chicago on July 21, 1976, and each made a statement to Detective Daly the following morning. (Tr. III: 674-76, 682-83, 815-21, 825; IV: 1030-31, 1034, 1041-45.)* These statements, which had been transcribed by a court reporter, were received into evidence over Holland's objection.

Payton related that Holland had called him about six weeks before the robbery, asking Payton and Moore to come to New York because he "had something working" and they would "make a little money." Payton and Moore flew to New York with two guns packed in Payton's suitcase, and moved in with Holland. (RP: 2-5; Tr. IV: 1031-34.)

According to Payton, about two weeks before the robbery Holland first brought up the idea of robbing the Van Dam Check Cashing facility. (RP: 5-6.) Elliott, Moore, Payton and Holland all participated in the discussions. The four originally planned to commit the robbery on June 11, 1976, but had to abort the plan on that day because

* References to the transcript of Payton's and Moore's statements will be designated "(RP:)" and "(PM:)," respectively, with the pages inserted. The transcripts were received into evidence at trial. (Tr. III: 815-25.)

the money courier had a gun. They returned the following Friday but, because of difficulties in renting a van, were late in arriving at the facility and missed the delivery of the money. (RP: 6-10.)

Payton recounted that prior to the third attempt on June 25, Holland and Moore had obtained a driver's license from someone in a building in Brooklyn. (RP: 11-12.) On June 25, Moore rented the van while Payton met Holland and Elliott at their workplace. Holland then drove Payton to the vicinity of the Van Dam office, where Moore had the van, and Payton got behind the wheel of the van. (Tr. IV: 1031-32; RP: 11, 13-16.) Holland then left the area but later drove by several times while Moore and Payton were sitting in the parked van. (RP: 17-18.) When Caccavalle arrived, Moore left the van, shot him three times, took the money bag, and jumped back into the van. Payton then drove off to the prearranged rendezvous point, where Holland and Elliott were waiting. (RP: 20-33; Tr. IV: 1032-33.)

According to Payton, he and Moore abandoned the van for Elliott's truck while Holland got into his own car. They all proceeded to Elliott's mother-in-law's house, where they counted and divided the money. Holland, Moore and Payton each received $10,000 while Elliott received $3,000. (RP: 23-27.) Moore and Payton then changed their clothes and Holland drove them to the airport. They then flew back to Chicago (RP: 30; Tr. IV: 1033) while Holland was supposed to dispose of the guns and money bag in the Atlantic Ocean. (RP: 28-29.) Finally, Payton recounted that on July 17, Holland visited him in Chicago, asking for money to hire a lawyer. (RP: 33-35.)

Moore's statement largely paralleled that of Payton. He told Detective Daly that in May 1976 Holland had called

and said that he "had something nice." (PM: 2.)* Moore arrived in New York with Payton some time in June and stayed with Holland until the robbery. Together they apparently stole some furs, but since these did not yield much money, they began to consider holding up the check-cashing office. During that time they visited the Van Dam facility once or twice in preparation. (PM: 2-4.) In addition, prior to the robbery, Moore and Holland robbed a man of his identification papers for use in renting a van. (PM: 4-6.)

On June 25, the day of the Van Dam robbery, Moore rented a van, using the stolen identification papers. He then followed Holland to the vicinity of the Van Dam facility. (PM: 4, 6-7; Tr. IV: 1036.) Payton joined Moore in the van but Holland left the area while Moore and Payton waited for Caccavale to arrive. When Caccavalle arrived, Moore got out of the van and approached him. Moore then fired three shots, grabbed the money bag, and jumped back into the van. (PM: 7-9; Tr. IV: 1037.)

According to Moore, he and Payton proceeded to an agreed-upon meeting place where Holland and Elliott were waiting. Moore and Payton then got into Elliott's truck and all four drove to Elliott's mother-in-law's house, where they counted and divided the money. Elliott received $3,000 and the other three each received $10,000. Moore went to the airport with Payton and Holland, and he and Payton flew back to Chicago. (PM: 9-13; Tr. IV: 1037-38.)

e. *Holland's Case*

None of the defendants testified at trial, and Holland called only one witness, Detective John O'Connell. Det.

* Moore understood this to mean a money-making deal. (PM: 12.)

O'Connell briefly testified that he had spoken with Holland in early July 1976 and that Holland at that time had denied participating in the robbery. (Tr. VI: 88-89, 92, 94.)

f. *State Post-Conviction Proceedings*

Following his conviction and sentence, Holland appealed to the Appellate Division, Second Department. On that direct appeal he raised two issues: (1) that the introduction at trial of his co-defendant's statements had violated his constitutional right of confrontation under *Bruton* v. *United States*, 391 U.S. 123 (1968) and (2) that two supplemental instructions by the Court on acting in concert had erroneously eliminated intent as an element of the substantive offense. The Appellate Division affirmed without opinion on February 23, 1981. 80 A.D. 2d 753 (2d Dep't 1981). Leave to appeal to the New York Court of Appeals was denied on April 30, 1981.

In May 1982, petitioner filed a motion to vacate his conviction pursuant to N.Y.C.P.L. § 440.10. On that motion he asserted three grounds to set aside his conviction: (1) that he had been illegally arrested, in violation of *Dunaway* v. *New York*, 442 U.S. 200 (1979), and that any resultant statements made by him should have been suppressed; (2) that his inculpatory statements had been obtained in violation of his right to counsel and his right against self-incrimination; and (3) that the joint trial had violated *Bruton*. On June 14, 1982, Justice Agresta denied the motion on procedural grounds. Citing N.Y.C.P.L. § 440.10(2) (a) & (2) (c), he ruled that Holland's claims either had been raised on appeal or should have been raised

on appeal.* Leave to appeal that decision was denied by the Appellate Division, Second Department on September 24, 1982.

On February 15, 1983, long after completion of his direct appeal and his motion to vacate, petitioner filed a motion in the Appellate Division for reargument and reconsideration of his direct appeal pursuant to N.Y.C.P.L. § 470.50. By this motion, Holland asserted that he had been denied effective assistance of counsel because his appellate counsel had failed to raise two meritorious issues on direct appeal, one of which was that petitioner's statement to Detective Daly following his request for a lawyer had been inadmissible under the Fifth Amendment. The State opposed the motion on two grounds: (1) that the motion was untimely because § 670.5 of the Rules of the Second Department require that such a motion be made within thirty (30) days of the decision**; and (2) that the

---

* The pertinent provisions of section 440.10 provide that a court must deny a motion to vacate a judgment when

> (a) The ground or issue raised upon the motion was previously determined on the merits upon an appeal from the judgment, unless since the time of such appellate determination there has been a retroactively effective change in the law controlling such issue; or
>
> * * *
>
> (c) Although sufficient facts appear on the record of the proceedings underlying the judgment to have permitted, upon appeal from such judgment, adequate review of the ground or issue raised upon the motion, no such appellate review or determination occurred owing to the defendant's unjustifiable failure . . . to raise such ground or issue upon an appeal actually perfected by him, ...

Presumably the *Bruton* claim had been raised on appeal, whereas the other two issues should have been raised on appeal.

** Although there was some apparent confusion on the record as to whether this ground was before the Appellate Division, it now appears that it was. *See* Letter of Richard Coppola, Clerk to Appellate Division, Second Department to Assistant District Attorney Raymond Cerreta, dated March 5, 1985.

requisite "good cause" to support a motion to reargue had not been established. The Appellate Division denied Holland's motion without opinion on July 6, 1983. On October 12, 1983, the New York Court of Appeals dismissed as untimely his request for reconsideration of its earlier denial of leave to appeal and also denied leave to appeal the Second Department's denial of his motion to reargue.

C. *Analysis*

1. *Exhaustion*

At the outset, respondent asserts that Holland has failed to exhause his state remedies with respect to the third of his three claims, which challenges the trial court's supplemental "aiding and abetting" instructions under *In re Winship*, 397 U.S. 358, 364 (1970), and its progeny. Although Holland did challenge these instructions on his state appeal, respondents argue that Holland failed to alert the state courts to the constitutional nature of his claim because his argument there was couched solely in state statutory terms. *See, e.g., Daye* v. *Attorney General of New York*, 696 F.2d 186, 191-92 (2d Cir. 1982) (en banc), *cert. denied*, 104 S. Ct. 723 (1984). If correct, this conclusion would require dismissal of the entire petition. *See, e.g., Rose* v. *Lundy*, 455 U.S. 509, 520 (1982). Although the question is a close one, I conclude that petitioner's argument to the state courts was barely sufficient to alert them to the constitutional issue.

In his present petition Holland argues that two of the trial court's supplemental instructions in effect advised the jury that it need not find intent in order to convict. Such an instruction, Holland claims, is inconsistent with the long-recognized due process requirement that the state

prove each element of a crime, including intent, beyond a reasonable doubt. *See, e.g., Francis* v. *Franklin*, 53 U.S. L.W. 4495, 4497 (U.S. April 29, 1985); *Sandstrom* v. *Montana*, 442 U.S. 510, 520 (1979).

In his state court appellate brief, Holland did challenge these two instructions. In doing so, however, he did not invoke the federal constitutional provision or even the equivalent state statutory provision—New York Penal Law § 70.20—which prohibits conviction unless the evidence "establishes beyond a reasonable doubt every element of [the] offense and the defendant's commission thereof." Rather, he argued that the instructions were inconsistent with the New York aiding-and-abetting statute, New York Penal Law § 20.00, which requires that the defendant be shown to have "both the intent to commit the crime and actions in furtherance of that crime. . . ." (*See* Petitioner's State Appellate Brief at 13-16.)

Whether this is adequate to exhaust petitioner's state remedies as to the constitutional claims depends upon whether the state law argument can be said to have "fairly presented" the constitutional issue to the state courts. *See, e.g., Picard* v. *Connor*, 404 U.S. 270, 275 (1971); *Daye* v. *Attorney General of New York, supra*, 696 F.2d at 191. As a general proposition, "[i]n order to have fairly presented his federal claim to the state courts the petitioner must have informed the state court of both the factual and legal premises of the claim he asserts in federal court." *Id.* at 191. In this case petitioner certainly alerted the state court to the factual premise of his claim, but it is not as apparent whether he adequately presented the legal premises of the claim.

The Second Circuit in *Daye* instructed that a state defendant, even without citing chapter and verse of the Con-

stitution, may adequately alert the state courts to the constitutional nature of his claims for habeas purposes. This may be accomplished in one of in four ways:

> (a) reliance on pertinent federal cases employing constitutional analysis, (b) reliance on state cases employing constitutional analysis in like fact situations, (c) assertion of the claim in terms so particular as to call to mind a specific right protected by the Constitution, and (d) allegation of a pattern of facts that is well within the mainstream of constitutional litigation.

Id. at 194. Petitioner claims that he falls within the last category, arguing that it is a constitutional axiom dating back 90 years that no person may be deprived of liberty "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970); *Davis* v. *United States*, 160 U.S. 469, 493 (1895).

The apparent difficulty with petitioner's position stems from the fact that the purpose of the *Daye* criteria is to identify situations where the state court is "informed" of or "alerted to" the constitutional nature of the claim. *See Daye, supra*, 696 F.2d at 191-92. *Accord, Petrucelli* v. *Coombe*, 735 F.2d 684, 689-90 (2d Cir. 1984). Recitation of a factual pattern well within the mainstream of constitutional litigation may be buried in an argument that relies solely on construction of a state statute, and in such a case the Court may not really be alerted to the constitutional issue.* This is a significant concern here since petitioner

* It is important to note that the factual pattern criterion in *Daye* was addressed specifically to the situation where the criminal defendant vaguely claims denial of a "fair trial." *Daye, supra*, 696 F.2d at 193. The invocation of "fair trial" along with the recognizable fact pattern may very well alert the court to the constitutional claim. Here, there was no reference to a right to a "fair trial" or use of other such talismanic language.

argued to the state court only that the challenged instructions did not comply with the substantive requirements of the aiding-and-abetting statute. Thus, in his state brief petitioner did not cite the New York provision that requires proof of all elements of the charged offense beyond a reasonable doubt, New York Penal Law § 70.20,* or even the many state cases establishing the right to have the prosecution prove every element of the offense. *See, e.g., People* v. *Newman*, 46 N.Y. 2d 126, 128, 412 N.Y.S. 2d 860, 861 (1978); *People* v. *Patterson*, 39 N.Y. 2d 288, 301, 383 N.Y.S. 2d 573, 581 (1977); *People* v. *Walker*, 198 N.Y. 329, 334-35 (1910); *People* v. *Alvarez*, 96 A.D. 2d 864, 481 N.Y.S. 2d 841 (2d Dep't 1983); *People* v. *Clemente*, 285 A.D. 258, 264-65, 136 N.Y.S. 2d 202, 208 (1st Dep't 1954).

Nonetheless, I find in this case that the state appellate court was sufficiently alerted to the constitutional issue that was implicit in petitioner's claim. In his state brief petitioner argued that intent was a necessary element of proof for accessorial liability, and that the supplemental instructions had eliminated this element from jury consideration.** This type of argument should call to mind the related constitutional principle since the due process requirement that the prosecution prove every element of the offense, including intent where required, is fundamental and well established. *See, e.g., Francis* v. *Franklin, supra*, 53 U.S.L.W. at 4497; *Sandstrom* v. *Montana, supra*, 442 U.S. at 520; *In re Winship, supra*, 397 U.S. at 364; *Davis*

* "No conviction . . . is valid unless based upon trial evidence . . . which establishes beyond a reasonable doubt every element of [the] offense and the defendant's commission thereof." New York Penal Law § 70.20 (McKinney's 1981).

** A similar argument was made at trial by Holland's counsel in objecting to the supplemental instruction. (Tr. VI: 374.)

v. *United States, supra,* 160 U.S. at 493; *People* v. *Segal,* 54 N.Y. 2d 58, 66, 444 N.Y.S. 2d 588, 591 (1981); *People* v. *Newman, supra,* 46 N.Y. 2d at 128, 412 N.Y.S. 2d at 861; *People* v. *Patterson, supra,* 39 N.Y. 2d at 301, 383 N.Y.S. 2d at 581; *People* v. *Walker, supra,* 198 N.Y. at 334-35; *People* v. *Alvarez, supra,* 96 A.D. 2d 864, 481 N.Y.S. 2d at 841; *People* v. *Egan,* 72 A.D. 2d 239, 242, 424 N.Y.S. 2d 546, 549 (4th Dep't 1980).* Where, as here, the factual allegations and legal argument strongly suggest a claim of constitutional deprivation, and "no reasonable jurist could doubt that the defendant's claim implicated [a] constiutional right," exhaustion will be presumed. *See Daye, supra,* 696 F.2d at 193, 196-97. *Cf. Callahan* v. *LeFevre,* 605 F.2d 70, 73-74 (2d Cir. 1979). All of petitioner's claims are therefore ripe for consideration by this Court.

2. *The Bruton Claim*

Petitioner's first claim is that the trial court's refusal to grant a severance and the admission at trial of his nontestifying co-defendants' statements violated his right to confrontation under the rule of *Bruton* v. *United States,* 391 U.S. 123 (1968).

The Sixth Amendment guarantees that in criminal trials the defendant shall have the right to confront and cross-examine the witnesses against him. In *Bruton,* the Supreme Court held that the use at a joint trial of an incriminating statement made by a nontestifying co-defendant violates the defendant's right of confrontation, notwithstanding instructions to the jury that it is to consider the statement only against the person who made it. *Id.* at

* Indeed, the landmark *Sandstrom* decision had been issued nearly two years before the Appellate Division denied Holland's appeal, although approximately two months after his attorney had filed his appellate brief.

135-37. A limiting instruction is deemed inadequate to guard against the suspect credibility and potentially devastating prejudicial impact of the co-defendant's statements. *Id.* 135-36.

The scope of the *Bruton* rule has been limited in one significant and pertinent respect in this Circuit. The Court of Appeals has repeatedly held that *Bruton* is inapplicable if the defendant himself has confessed and his statements sufficiently "interlock" with those of his co-defendants. *See, e.g., United States* v. *Paternina-Vergara*, 749 F.2d 993, 998 (2d Cir. 1984); *Tamilio* v. *Fogg*, 713 F.2d 18, 20 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 706 (1984); *United States ex rel. Stanbridge* v. *Zelker*, 514 F.2d 45, 48-49 (2d Cir.), *cert. denied*, 423 U.S. 872 (1975); *United States ex rel. Catanzaro* v. *Mancusi*, 404 F.2d 296, 300 (2d Cir. 1968), *cert. denied*, 397 U.S. 942 (1970).* The rationale for the interlocking confessions exception is that the "devastating" prejudicial impact of a co-defendant's statements is absent or minimized when the defendant himself confesses. *See, e.g., Parker* v. *Randolph, supra*, 442 U.S. at 74 & n. 7;

---

* In *Parker* v. *Randolph*, 442 U.S. 62 (1979), the Supreme Court sought to resolve a conflict among the circuits as to whether there should be an interlocking confessions exception to *Bruton*. 442 U.S. at 68. *Cf. id.* at 68 n. 4 & *Randolph* v. *Parker*, 575 F.2d 1178, 1184 n. 3, *rev'd*, 442 U.S. 62 (1979) (citing cases accepting and rejecting interlocking confessions rule). The plurality (four out of eight Justices) in *Parker* approved of the interlocking confessions exception, while Justice Blackmun in concurrence and the three dissenting Justices rejected a *per se* rule, preferring a harmless error analysis. This even split among the Justices left intact the conflicting rules in the different Circuits. *Compare United States* v. *Paternina-Vergara, supra*, 749 F.2d at 998 (applying interlocking confessions rule), *with United States* v. *Ruff*, 717 F.2d 855, 858 (3d Cir. 1983), *cert. denied*, 104 S. Ct. 733 (1984) (rejecting interlocking confessions rule in favor of harmless error analysis); *United States* v. *Parker*, 622 F.2d 298, 301 (8th Cir. 1980), *cert. denied*, 455 U.S. 926 (1981) (same).

Stanbridge v. *Zelker, supra,* 514 F.2d at 48. Thus the rule functions in effect as a modified version of a harmless error rule, although it supplements rather than replaces that saving principle. *See, e.g., Tamilio* v. *Fogg, supra,* 717 F.2d at 21.

Confessions do not have to be identical to be interlocking. *See Stanbridge* v. *Zelker, supra,* 514 F.2d at 49; *United States ex rel. Ortiz* v. *Fritz,* 476 F.2d 37, 39 (2d Cir.), *cert. denied,* 414 U.S. 1075 (1973). It is sufficient if the confessions are "substantially the same and consistent on the major elements of the crime involved," *Tamilio* v. *Fogg, supra,* 713 F.2d at 20 (*quoting Stanbridge* v. *Zelker, supra,* 514 F.2d at 49), or essentially the same "[a]s to motive, plot and execution of the crime." *Ortiz* v. *Fritz, supra,* 476 F.2d at 39.

In evaluating the degree of similarity between Holland's various statements, on the one hand, and those of Moore and Payton, on the other, it is important first to examine the legal basis for Holland's criminal liability. Since Holland concededly did not participate in the actual hold-up at the Van Dam office, his responsibility for felony murder under N.Y. Penal Law § 125.25* is based upon the

---

* Felony murder is defined as follows:

A person is guilty of murder in the second degree when:

* * *

* * *

3. Acting either alone or with one or more other persons, he commits or attempts to commit robbery, burglary, kidnapping, arson, rape in the first degree, sodomy in the first degree, sexual abuse in the first degree, escape in the first degree, or escape in the second degree, and, in the course of and in further of such crime or of immediate flight therefrom, he, or another participant, if there be any, causes the death of a person other than one of the participants; except that in any prosecution under this subdivision, in which the defendant was not the only par-

(footnote continued on next page)

State's proof of his conduct as an accessory. The pertinent provision of the Penal Law provides that:

> When one person engages in conduct which constitutes an offense, another person is criminally liable for such conduct when, acting with the mental culpability required for the commission thereof, he solicits, requests, commands, importunes, or intentionally aids such person to engage in such conduct.

N.Y. Penal Law § 20.00 (McKinney's 1975). Thus it must ordinarily be proven, at a minimum, that the defendant intentionally aided the commission of the crime and that he did so with the intent to bring about the criminal act. *See, e.g., Guichard* v. *Smith*, 471 F. Supp. 784, 791 n. 7 (E.D.N.Y. 1979); *People* v. *Howard*, 75 A.D. 2d 1007, 1007-08, 429 N.Y.S. 2d 131, 132-33 (4th Dept. 1980). The necessary intent is crucial, and thus "one [who] indifferently but knowingly aids or facilitates the commission of a crime by providing another with means or opportunity for the commission thereof, without having any specific intent on his own part to commit or profit from the crime (*e.g.*, lending

---

ticipant in the underlying crime, it is an affirmative defense that the defendant:

> (a) Did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid the commission thereof; and
>
> (b) Was not armed with a deadly weapon, or any instrument, article or substance readily capable of causing death or serious physical injury and of a sort not ordinarily carried in public places by law-abiding persons; and
>
> (c) Had no reasonable ground to believe that any other participant was armed with such a weapon, instrument, article or substance; and
>
> (d) Had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

N.Y. Penal Law § 125.25(3) (McKinney's 1975).

a friend a car with knowledge that he intends to use it to commit a robbery) . . . quite clearly is not liable for the crime which he facilitates, for it cannot be truly said that he acts 'with the mental culpability required for the commission thereof.'' N.Y. Penal Law § 20.00, Practice Commentaries (McKinney's 1975). A person who engages in knowing but essentially passive facilitation would be criminally liable for the separate offense of criminal facilitation under Article 115 of the Penal Law,* but would not be liable under section 20.00 for the offense that he aided. *See Casillas* v. *Scully*, Dkt. No. 85-2033, slip op. at 5279-81 (2d Cir. July 25, 1985) (describing differences between aiding and abetting and criminal facilitation under New York law).

In view of the significance of a defendant's state of mind under these respective provisions, I conclude that Holland's statements—although highly incriminating—are sufficiently different from the statements of Payton and Moore that they do not come within the interlocking confessions exception to the *Bruton* rule. Specifically, although Holland's statements admit all of the necessary physical acts and are highly suggestive of the necessary intent, they still permit a contrary, if improbable, inference that Holland lacked the requisite specific intent. In

---

* Section 115.05 provides:

> A person is guilty of criminal facilitation in the first degree when, believing it probable that he is rendering aid to a person who intends to commit a class A felony, he engages in conduct which provides such person with means or opportunity for the commission thereof and which in fact aids such person to commit such class A felony.

N.Y. Penal Law § 115.05 (McKinney's 1975). Criminal facilitation in the second degree is defined to include facilitation of any crime other than a class A felony. *See* N.Y. Penal Law § 115.00 (McKinney's 1975).

contrast, the statements of Moore and Payton, if credited, would conclusively establish the requisite specific intent.

As already noted, in one or another of his statements Holland admitted being present when the other three men planned the robbery, advising them as to where to rent a van to carry out the hold-up, actually driving them to Long Island City to lease the van, joining them after the robbery, disposing of the guns and money bags, and receiving a $10,000 share of the proceeds, which was the same as Moore and Payton received, and far more than the $3,000 given to Elliott for his part in the robbery. Plainly, these admissions would be more than ample in themselves to convict Holland under § 20.00 for aiding and abetting, with the attendant liability for felony murder. *See, e.g., People* v. *Jackson*, 44 N.Y. 2d 935, 937, 408 N.Y.S. 2d 315 (1978); *People* v. *Keitt*, 42 N.Y. 2d 926, 927, 397 N.Y.S. 2d 997 (1977).

Nonetheless, at no point can it fairly be said that Holland explicitly admitted intending to bring about the robbery, although such intent may readily be inferred from the acts that he admitted performing. In contrast, Payton's statement—although it coincides in almost all other material details with Holland's admissions—differs from those statetments in that it explicitly invests Holland with the necessary intent by describing him as the originator of the plan to rob the Van Dam office. Similarly, Moore's statement, while not characterizing Holland as the originator of the plan, describes him as an active participant in its planning.*

* Thus, Moore stated that Holland had accompanied him and Payton in checking out the Van Dam office as a possible robbery target. He also reported that Holland had participated with him in robbing Thompson to obtain identification for leasing the van. (Statement at 4-5.)

Although the question is a close one, on balance I am persuaded that the statements of Moore and Payton diverge sufficiently from Holland's own statements in this one significant respect to justify the conclusion that they do not interlock with his admissions. *Compare United States* v. *Costello*, 426 F.2d 905, 907 (2d Cir. 1970) (defendant's statement that he had planned the robbery did not sufficiently interlock with co-defendant's statement, which detailed defendant's role in the crime); *United States* v. *Bethea*, 505 F. Supp. 698, 704-05 (E.D.N.Y. 1980) (statements not interlocking where, although similar as to the events and occurrences, they each supported a different, and conflicting, inference as to the other defendant's state of mind), *with United States ex rel. Ortiz* v. *Fritz*, *supra*, 476 F.2d at 39 (confessions interlocking where co-defendants' confessions did not implicate defendant any more than his own confession). Accordingly, the *Bruton* rule does apply in this case and thus the trial court's denial of the motion to sever was erroneous.

Notwithstanding this conclusion, *Bruton* does not compel the granting of the writ in this case. The weight of the inculpatory evidence at trial—including Holland's own devastating admissions, the testimony of the co-conspirator Elliott, as well as the identification testimony of Caryl Thompson—was so substantial that the trial court's ruling was surely "harmless beyond a reasonable doubt" under *Chapman* v. *California*, 386 U.S. 18, 24 (1967). *See Parker* v. *Randolph*, *supra*, 442 U.S. at 79-80 (Blackmun, J., concurring); *Tamilio* v. *Fogg*, *supra*, 713 F.2d at 21; *United States* v. *Fleming*, 594 F.2d 598, 603-04 (7th Cir.), *cert. denied*, 442 U.S. 931 (1979); *Fritz* v. *Ortiz*, *supra*, 476 F.2d at 40.*

---

* It is beyond dispute that a *Bruton* error may be harmless error within the meaning of *Chapman*. *See Schneble* v. *Florida*, 405 U.S. 427, 430 (1972); *Harrington* v. *California*, 395 U.S. 250, 254 (1969).

In assessing whether an error is harmless, the Court must evaluate the "probable impact of the [inadmissible] confessions on the minds of an average jury," *Harrington* v. *California*, *supra*, 395 U.S. at 254, and determine whether "the 'minds of an average jury' would not have found the State's case *significantly* less persuasive [absent the improper evidence.]" *Schneble* v. *Florida*, *supra*, 405 U.S. at 432 (emphasis added); *accord*, *Hawkins* v. *LeFevre*, 758 F.2d 866, 877 (2d Cir. 1985) (in assessing whether constitutional error is harmless, court has to look to the probable impact of the error on an average trier of fact.

Thus, the court "must consider the gravity of the errors in relation to 'the totality of the proof offered against [petitioner].'" *Sales* v. *Harris*, 675 F.2d 532, 540 (2d Cir.), *cert. denied*, 459 U.S. 876 (1982); *Klein* v. *Harris*, 667 F.2d 274, 290 (2d Cir. 1981). *Accord*, *Schneble* v. *Florida*, *supra*, 405 U.S. at 430.* In this case, the totality of

* An alternative formulation of this test is found in *Schneble*—whether "there is a reasonable possibility that the improperly admitted [confessions] contributed to the conviction." 405 U.S. at 432. Literally read, such a definition would virtually eliminate the harmless error rule since, as the Second Circuit recently noted, "an appellate court can almost always discern some 'reasonable' possibility that an error influenced a trier of fact." *Hawkins* v. *LeFevre*, *supra*, 758 F.2d at 877. The more reasonable, and accepted, reading of the test is whether the State's case would have been significantly less persuasive absent the co-defendant's statements. *See*, *e.g.*, *Tamilio* v. *Fogg*, *supra*, 713 F.2d at 21.

Although petitioner cites *Anderson* v. *Smith*, 751 F.2d 96 (2d Cir. 1984), for the apparent notion that the "reasonable possibility" language of *Schneble* should be read broadly, I do not so read *Anderson*. Rather, in applying the *Schneble* test the Court there found that in the absence of the improperly admitted evidence—which was a video-taped confession by the defendant—the State's case would have been quite weak. *Id.* at 106. In view of this weakness and the obviously highly prejudicial effect of a videotaped confession, the Court concluded: "Though perhaps sufficient to support conviction, the other evidence certainly fell far short of being overwhelming enough to negate the detrimental effect of the videotape." *Id.* at 106.

that proof was so overwhelming that admission of the two statements in question plainly constituted harmless error.

In assessing the likely impact of Moore's and Payton's statements on a "reasonable" jury, I note first the particular significance of the fact that petitioner himself made a series of highly damaging inculpatory statements. *See, e.g., Schneble* v. *Florida, supra,* 405 U.S. at 430-31; *Tamilio* v. *Fogg, supra,* 713 F.2d at 21; *United States* v. *Vissars,* 596 F.2d 400, 404 (9th Cir. 1979); *United States* v. *Fleming, supra,* 594 F.2d at 604. These statements constituted admissions by Holland of substantial involvement in the planning and implementation of the crime, both before and after the robbery, and by themselves virtually compelled a strong inference of guilt.* Thus, Holland admitted that Moore and Payton had planned the robbery in his house and in his presence, that he had advised them where to rent a van and in fact had driven them to the vicinity of the rental office while knowing that the van was to be used in the robbery, that he had met Moore, Payton and Elliott after the robbery, that he had disposed of the money bag and the guns used in the robbery and that he had received an equal share in the proceeds of the robbery.

Moreover, the substance of Holland's admissions was heavily reinforced by the testimony of Elliott, who had admitted his participation in the robbery plan. Elliott testified that it was Holland who first told him of the intended robbery and asked whether he wanted to make some money; that Holland had participated in the planning of

* The similarity of Holland's admission to the statements of Moore and Payton—although perhaps not sufficient for interlock—certainly limited the prejudicial effect of the co-defendants' statements. *Cf. Tamilio* v. *Fogg,* 546 F. Supp. 364, 370-71 (E.D.N.Y. 1982), *rev'd on other grounds,* 713 F.2d 18 (2d Cir. 1983).

the robbery; that, according to plan, Holland had waited in the vicinity of the Van Dam office at the time of the hold-up and had met the other three men after the robbery; that Holland had provided Moore and Payton with changes of clothing; that Holland had also driven them to the airport; and that Holland had received a share of the proceeds equal to that of Moore and Payton. Such inculpatory testimony by an accomplice who—as in this case—is subject to full cross-examination further significantly attentuates the prejudicial effect of the erroneous introduction of the statements of Moore and Payton. *See, e.g., Harrington* v. *California, supra*, 395 U.S. at 253; *United States ex rel. Smith* v. *Montanye*, 505 F.2d 1355, 1360 (2d Cir. 1974), *cert. denied*, 423 U.S. 856 (1975).

Other independent evidence also corroborated petitioner's guilt. Of particular note in this regard was the testimony of Caryl Thompson, who at trial positively identified petitioner as one of the two men who had stolen his license the day before the robbery. That license was used to rent the van used in the robbery, and Holland's role in its seizure constitutes additional persuasive evidence that Holland played an active role in bringing about the robbery of the Van Dam office. Moreover, in further confirmation of Holland's active role in the successful completion of the robbery, Holland led the police to the precise sewer in which he had disposed of the money bag and murder weapons.

In the face of this overwhelming array of evidence, Holland offered essentially nothing but the argument of his attorney that he had not intended to involve himself in the crime.* Although Holland tried to place the sole respon-

* Although Holland called one police witness, the only testimony he offered was that on one occasion Holland did not confess to being involved.

sibility on Moore and Payton, this version of the facts is simply untenable in light of the essentially uncontradicted evidence of Holland's involvement. Accordingly, I conclude that "the 'minds of an average jury' would not have found the state's case significantly less persuasive had [the codefendants'] admissions been excluded." *Tamilio* v. *Fogg, supra,* 713 F.2d at 21 (citing, *inter alia, Schneble* v. *Florida, supra,* 405 U.S. at 432).*

3. *The Miranda Claim*

Petitioner's second claim is that the admission of the last of his three statements—which was made to Detective Daly—violated his right against self-incrimination under *Miranda* v. *Arizona,* 384 U.S. 436, 474-75 (1966), and its progeny because the statement was made after Holland had invoked his right to counsel.** I find that this Court is pre-

* Petitioner argues that two questions posed by the jury to the Court during the course of deliberations demonstrate that the jurors were in doubt as to Holland's guilt because those questions concerned the nature of accessorial liability. Wholly apart from the entirely speculative nature of petitioner's analysis of the jurors' state of mind, this argument misses the mark because the harmless error rule looks to the effect of specific evidence on the average jury, not on the particular jury that sat in the case. *See Hawkins* v. *LeFevre, supra,* 758 F.2d at 877.

I likewise reject petitioner's argument that the prosecution's use of Moore's and Payton's statements against Holland during summation irreparably prejudiced petitioner. In context the prosecutor's improper remarks were peripheral to his summation and did not create any substantial risk of prejudice. *See Kirksey* v. *Jones,* 673 F.2d 58, 60-61 (2d Cir. 1982).

** The United States Supreme Court has held that an accused who has "expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Edwards* v. *Arizona,* 451 U.S. 477, 484-85 (1981). *Edwards* was decided after petitioner's conviction, and this past

(footnote continued on next page)

cluded from considering this claim on the merits because of petitioner's failure to raise the issue on his direct appeal in the state courts.

It has long been held that state decisions resting on adequate and indepedent state grounds are immune from federal review. *See Wainwright* v. *Sykes*, *supra*, 433 U.S. at 81. Accordingly, if a criminal defendant waives a federal constitutional claim in state court by his failure to comply with state procedural rules, a federal habeas court is barred from considering the waived claim absent a showing of "cause" and "prejudice." *Engle* v. *Isaac*, 456 U.S. 107, 129 (1982); *Wainwright* v. *Sykes*, *supra*, 433 U.S. at 90-91; *Tsirizotakis* v. *LeFevre*, 736 F.2d 57, 62 (2d Cir.), *cert. denied*, 105 S. Ct. 216 (1984); *Dudley* v. *Dalsheim*, 686 F.2d 110, 111-12 (2d Cir. 1982) (*per curiam*). This rule applies to waiver both at trial and on appeal. *See, e.g.*, *Mitchell* v. *Scully*, 746 F.2d 951, 955-56 (2d Cir. 1984), *cert. denied*, 105 S. Ct. 1765 (1985); *Towndrow* v. *Henderson*, 692 F.2d 262, 265-66 (2d Cir. 1982) (*per curiam*); *Dudley* v. *Dalsheim*, *supra*, 686 F.2d at 111 (involving an issue raised on a motion to vacate but not raised on direct appeal); *Taylor* v. *Harris*, 640 F.2d 1, 1-2 & n. 2 (2d Cir.), *cert. denied*,

---

term the United States Supreme Court held that *Edwards* would apply retroactively to cases pending on direct appeal at the time of the decision, *Shea* v. *Louisiana*, 53 U.S.L.W. 4173, 4175 (February 20, 1985), although it does not apply if the direct state appeal was already completed. *See Solem* v. *Stumes*, 104 S. Ct. 1338, 1342-46 (1984).

Edwards was decided on May 18, 1981, eighteen days after the New York Court of Appeals had denied Holland leave to appeal from the adverse decision of the Appellate Division. Nonetheless, petitioner argues that his motion for reargument and reconsideration pursuant to N.Y.C.P.L. § 470.50, which was filed after the *Edwards* decision, is part of the direct appeal process, and that his claim is therefore cognizable under *Shea* v. *Louisiana*. Since, however, petitioner's claim is procedurally barred under *Wainwright*, the Court need not decide this question.

452 U.S. 942 (1981) (*citing* N.Y.C.P.L. § 440.10(2)(c)); *Forman* v. *Smith*, 633 F.2d 634, 640 (2d Cir.), *cert denied*, 450 U.S. 1001 (1980) (same). *See also People* v. *Cunningham*, 104 Misc. 2d 298, 300-02, 428 N.Y.S. 2d 183, 186-87 (Sup. Ct. Bronx Cty. 1980) (general discussion of 440.10 (2)(c)).

Petitioner here did not raise his *Miranda* claim on his direct appeal. That failure constituted a waiver under state law, *see* N.Y. Penal Law § 440.10(2)(c), and accordingly when petitioner sought to assert the claim on his post-appeal motion to vacate, the Court declined to reach it because of the procedural bar.

In an attempt to avoid the effect of the procedural bar rule, petitioner argues that he did in fact timely assert the *Miranda* claim on his direct appeal because he raised it on his belated motion to reargue in the Appellate Division. This suggestion is unpersuasive.

First, the claim that petitioner actually asserted on his motion as ineffective assistance of counsel and not the *Miranda* claim now before us. Although one of the bases for the ineffective assistance claim was the attorney's failure to raise the *Miranda* claim on appeal, the two claims are separate and distinct and constitute independent legal grounds for relief.

Second, the record also indicates that that motion was denied on procedural grounds and thus that the Appellate Division did not reach the merits of the claim. The State opposed the motion on the ground that it did not comply with section 670.5 of the Rules of the Appellate Division, Second Department, which requires that a party must file a motion to reargue within 30 days of the original decision, and that the motion be limited to instances where the court

overlooked or misunderstood the facts or the law. *See* 22 N.Y.C.R.R. § 670.5. Since the State argued a procedural bar and the Appellate Division denied petitioner's motion without opinion, I must infer that court's decision rested on the procedural grounds asserted. *See Martinez* v. *Harris*, 675 F.2d 51, 54-55 (2d Cir.), *cert. denied*, 459 U.S. 849 (1982). Moreover, this inference is quite reasonable here. Section 470.50 of the Criminal Procedure Law confers discretion upon the court to order reargument or reconsideration *only* in the "interest of justice" and for good cause shown. I simply cannot assume that the court, by its silence, intended to exercise its limited "interest of justice" jurisdiction to consider the merits of petitioner's claim.* *See Martinez* v. *Harris*, *supra*, 675 F.2d at 54-55; *cf. People* v. *Williams*, 97 Misc. 2d 24, 32, 410 N.Y.S. 2d 978, 983 (Dutchess Cty. Ct. 1978).

Third, petitioner's argument, if accepted, would entirely undermine both the procedural bar rule of N.Y.C.P.L. § 440.10(2)(c) and the rationale of *Wainwright*. In effect a criminal defendant would never waive a legal claim by virtue of his failure to assert it on his direct appeal since he could, at any time, file a motion for reargument or reconsideration in the state appellate court. Such an evasion of the State's very reasonable procedural requirements, and of the concomitant federal habeas procedural default rule, is unsupported by either legal authority or common sense.

In sum, *Wainwright* does apply to petitioner's *Miranda* claim, and accordingly this Court is barred from reaching

---

* As the Practice Commentary to section 470.50 notes:

> As a practical note, reargument is one of the most rarely granted remedies known to the appellate species but it is all too often sought as the last grasp at the last straw.

the merits of that claim absent a showing of cause and prejudice.

Applying *Wainwright*, I find that Holland has failed to show the requisite "prejudice" from the admission of the third of his three statements, the one made to Det. Daly.* Unlike the harmless error test, the criterion for prejudice sufficient to overcome a procedural default places on the petitioner the burden of persuasion and requires that he show that the "errors at his trial . . . worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *United States* v. *Frady, supra*, 456 U.S. at 170 (emphasis omitted); *Forman* v. *Smith, supra*, 633 F.2d at 642. As explained by the Second Circuit in *Forman*, two key factors in determining prejudice are the weight of evidence at trial and whether the error in question is likely to have affected the reliability of the trial. 633 F.2d at 642-43. In this case the untainted evidence was more than ample to convict,** and the introduction of the statement to Detective Daly did not undermine the reliability of the trial.

---

* The cause and prejudice requirement is posed in the conjunctive and the absence of either precludes habeas review. *See United States* v. *Frady*, 456 U.S. 152, 168 (1982); *Engle* v. *Isaac*, *supra*, 456 U.S. at 134, n. 43.

The excusable "cause" asserted by petitioner is his appellate counsel's failure to raise "winning" claims on the direct appeal. Counsel's mistakes do not constitute cause, however, unless they are so egregious as to amount to a sixth amendment violation. *Tsirizotakis* v. *LeFevre*, *supra*, 736 F.2d at 62; *Indiviglio* v. *United States*, 612 F.2d 624, 631 (2d Cir. 1979), *cert. denied*, 445 U.S. 933 (1980). In any event, the Supreme Court has admonished that courts should avoid grading counsel's performance and, where practicable, dispose of ineffective assistance claims on the ground of lack of sufficient prejudice. *Strickland* v. *Washington*, 104 S. Ct. 2052, 2069-70 (1984). I do so here.

** In view of my conclusion with respect to the *Bruton* issue, I do not include the statements of Moore and Payton as incriminating evidence against which the prejudice to petitioner should be weighed.

Petitioner here argues that his admission to Detective Daly that he had hiden the guns and received $10,000 from the robbery was "surely the most devastating [evidence] to his case." (Pet. Supp. Br. at 18.) This argument simply ignores the fact that petitioner had previously admitted to Detective Greene that he had hidden the guns and the money bag,* that Detective Green had testified that "they"--presumably including petitioner—had shared in the proceeds of the robbery, and that Elliott had specifically testified that petitioner had received $10,000 from the robbery. In light of the overwhelming evidence at trial against petitioner, *see Forman* v. *Smith*, *supra*, 633 F.2d at 642, the introduction of the admissions that petitioner made to Detective Daly can hardly be deemed to have significantly affected the reliability of the trial.**

In sum, I conclude that the Court is barred from considering the merits of petitioner's *Miranda* claim because of his procedural default.†

---

* Various officers also testified that petitioner in fact had led them to where the guns and bag were hidden.

** Indeed it is to be doubted that the introduction of the statement in question—even if erroneous—affected the reliability of the trial in any respect. As the Second Circuit noted in *Forman*, when the purported violation of a criminal defendant's rights involves the illegal obtaining of inculpatory statements—such as by a failure to comply with the *Miranda* rule—the reliability of the trial result is not necessarily brought into serious question in the absence of any indication "that the circumstances of [petitioner's] questioning were coercive." 633 F.2d at 643. Here there is little or no evidence of coerciveness and hence the introduction of petitioner's statement did not affect the reliability of the outcome.

† Petitioner has requested, in the event that the court finds his *Miranda* claim unreviewable, that his petition be deemed amended to assert an ineffective assistance of counsel claim based upon his appellate counsel's failure to raise the *Miranda* claim on direct appeal. There are several difficulties with this approach, all of them fatal.

(footnote continued on next page)

4. *The Supplemental Instruction Claim*

Petitioner's third claim is that the court's supplemental instructions to the jury eliminated the element of intent, in violation of In re *Winship, supra,* 397 U.S. at 364. I disagree and find that the supplemental instructions, reasonably interpreted, did not run afoul of *Winship.*

To evaluate this claim it is necessary to review briefly the nature of the challenged instructions and the context in which the instructions were given.

During his principal charge, Justice Agresta repeatedly instructed the jury that the burden was on the People to

---

First, petitioner has not exhausted his state remedies with respect to such a claim. Although he attempted to assert it by his reargument motion before the Appellate Division, that was not the proper forum or vehicle since the motion was untimely and in any event reargument appears to be limited to claims previously asserted. Since exhaustion requires assertion of a claim in the correct forum, *see, e.g., Klein* v. *Harris, supra,* 667 F.2d at 282, petitioner's motion does not satisfy this requirement. Second, even assuming that the claim is properly before the Court, I nonetheless find it meritless. To prevail on an ineffective assistance of counsel claim, petitioner must "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." This inquiry is quite similar, if not identical, to the analysis of "prejudice" under *Sykes. See Washington* v. *Strickland,* 104 S. Ct. 2052, 2068 (1984). As discussed above, the admission of Detective Daly's statements, even if improper, had no significant effect on the case.

Moreover, appellate counsel's failure to raise the *Miranda* issue on appeal did not fall below an "objective standard of reasonableness." *Id.* at 2065. Courts are admonished not to "second-guess reasonable professional judgments" by appellate attorneys as to what issues should be raised on appeal. *Jones* v. *Barnes,* 103 S. Ct. 3308, 3313-14 (1983). Petitioner's appellate brief was filed in April 1978, well before the decisions cited by petitioner as establishing a new rule to govern police questioning of suspects. Under the governing law the determination of such *Miranda* claims required a case-by-case analysis of whether the defendant had knowingly and intelligently waived his right to counsel. *See Solem* v. *Stumes, supra,* 104 S. Ct. at 1343-45. Thus, in this case the issue would have turned primarily on the credibility of Detective Daly, who testified to facts sufficient to demonstrate such a waiver, and such a determination was within the province of the trial judge at the pre-trial hearings.

prove each and every element of the crime charged beyond a reasonable doubt. (Tr. VI: 317-18; 341-42, 343, 348.) Thus, for example, after defining robbery and larceny for the jury (Tr. VI: 342-43), the justice went on to state:

> You will note from the definitions I have just given with respect to larceny that there must be an intent to deprive another of property, so that the People must prove beyond a reasonable doubt that the defendant intended to commit the crime with which he is charged.

(Tr. VI: 343.) The justice then proceeded to explain in detail the nature of the intent required for the underlying crimes (Tr. VI: 343-35) and again admonished the jurors that "any reasonable doubt as to the existence or nature of the intent must be resolved in defendant's favor." (Tr. VI: 345.)

On the issue of acting in concert, which was plainly pertinent to Holland, Justice Agresta stated as follows:

> According to law when one person engages in robbery in the first degree another person is criminally liable for such robbery in the first degree when acting with the mental culpability required for the commission thereof he solicits, requests, commands, importunes or intentionally aids such person to engage in a robbery in the first degree.[*]
>
> This means that if you find that any of the defendants with the intent to commit the crime of robbery in the first degree solicited, requested, commanded, importuned or intentionally aided others to commit the crime of robbery in the first degree each is equally guilty of robbery in the first degree even if you find that he himself actually committed none of the acts requisite to the commission of the robbery in the first

* This portion of the instruction is simply an adaption of N.Y.P.L. § 20.00.

> degree as I have just explained them to you, and even if you find that a defendant was not physically present at the time and place of the commission of the robbery in the first degree.

(Tr. VI: 345-46.) The Court then charged the jurors on the connection between robbery and felony murder, and instructed that the jury must find that defendants acted in concert "prior to the murder." (Tr. VI: 346-48.) Defendants asserted no objections to the court's main charge that are pertinent to the issues on this petition. (Tr. VI: 354-57.)

After completion of the charge, the jury was excused for lunch at 1:10 P.M. The record does not indicate when the jury returned to deliberate, but the record does reflect that the jury submitted questions to the judge at 3:10 P.M. Dinner was taken from 7:00 to 8.30 P.M. (Tr. VI: 363-66.) At 10:55 P.M., the jury sent in two notes, each of which asked a question that was pertinent to Holland's criminal liability. It is the Court's answers to these two questions that form the basis for petitioner's present third claim.

The first note read:

> Would a person be acting in concert even if he helps in the commission of a crime without intent receiving [sic] personal benefits from the crime?

(Tr. VI: 367.) In response the justice stated:

> It makes no difference what his intent was. If he is acting in concert, he is equally liable with anybody else.

(Tr. VI: 367.)

The second note read:

> Would someone be acting in concert if he . . . had knowledge of a crime, without reporting it to the proper authorities?

(Tr. VI: 368.) The justice's response to this question was the following:

> It has nothing to do with the case whether he reports it to the authorities or not. You must determine whether the individuals were acting in any way either in the participation of the crime or benefitting from the crime; that's your responsibility in determining the innocence or guilt of each of the defendants.

(Tr. VI: 368.)

After the jury returned to deliberate, petitioner's counsel objected unsuccessfully to both supplemental instructions. (Tr. VI: 372-74.) The jurors deliberated until 11:40 P.M., but did not reach a verdict. They were then sequestered for the night. (Tr. VI: 375.) The following morning, the jurors deliberated from 9:30 to 11:25 A.M., when they found all three defendants guilty of felony murder. (Tr. VI: 378-81.)

Fairly construed, I cannot conclude that the answers given by the Court to the two questions at issue were so misleading and prejudicial as to raise the due process concerns asserted by petitioner.

Generally speaking, federal habeas relief for errors in the jury charge will only be granted where, in the context of the overall charge and the entire trial, the "ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." *Cupp* v. *Naughten*, 414 U.S. 141, 146-47 (1973); *Francis* v. *Franklin*, *supra*, 53 U.S.L.W. at 4497; *United States* v. *Frady*, *supra*, 456 U.S. at 169; *Henderson* v. *Kibbe*, 431 U.S. 145, 154 (1977). In assessing the prejudicial impact of an erroneous instruction on a defendant's right to a fair trial, special consideration must be given to errors in a supplemental charge. *See, e.g., Bollenbach* v. *United States*, 326 U.S. 607, 612 (1946); *Rock* v. *Coombe*, 694 F.2d 908, 915 (2d Cir. 1982),

cert. denied, 460 U.S. 1083 (1983); *Arroyo* v. *Jones*, 685 F.2d 35, 39 (2d Cir.), *cert. denied*, 459 U.S. 1048 (1982).* Nevertheless, an error in a supplemental charge does not automatically warrant reversal. *See, e.g., Rock* v. *Coombe*, *supra*, 694 F.2d at 915.

There is no question that the due process clause requires the state in criminal prosecutions to prove every element of the crime charged beyond a reasonable doubt, *see In re Winship*, *supra*, 397 U.S. at 364; *Davis* v. *United States*, *supra*, 160 U.S. at 493, and that it would be constitutional error for the judge in his supplemental instruction to eliminate the necessary element of intent. The crucial question here is whether the supplemental instructions in effect misled the jury into believing that it could convict petitioner without finding intent.

In addressing the question of whether a jury instruction has improperly shifted the burden of proof on the issue of intent, the Supreme Court has instructed that "whether a defendant has been accorded his constitutional rights depends on the way in which a *reasonable* juror could have interpreted the instruction." *Sandstrom* v. *Montana*, *supra*, 442 U.S. at 514 (emphasis added). *Accord, Connecticut* v. *Johnson*, 103 S. Ct. 969, 974, 976 (1983); *Cupp* v. *Naughten*, *supra*, 414 U.S. at 141. In making this evaluation, the court must, of course, interpret the instruction in the context of the whole charge. *See, e.g., Francis* v. *Franklin*, *supra*, 53 U.S.L.W. at 4497.

On the record before me, I do not believe that a reasonable juror could have interpreted the supplemental instruc-

* Errors in supplemental instructions are attributed greater weight because (1) they are received by the jury with greater attentiveness than the typically far lengthier initial charge; (2) they are given in response to specific questions by the jury; and (3) they are assumed to remain in the forefront of the jurors' minds because they are isolated, and the most recent instructions. *See Arroyo* v. *Jones*, *supra*, 685 F.2d at 39.

tions to mean that the State was not required to prove intent to convict petitioner. Moreover, the rationale for according special treatment to supplemental instructions supports this conclusion.

The words used by the trial judge cannot be considered in the abstract, but only in reference to the questions asked by the jury. Thus, the judge's statement that "it makes no difference what his intent was" has to be read in reference to the jury's question: "Would a person be acting in concert even if he helps in the commission of a crime without [the] intent [of] receiving benefits from the crime." In context, the judge only instructed that intent to benefit is irrelevant.

In response to the question "would someone be acting in concert if he . . . had knowledge of a crime, without reporting it to the proper authorities?" the judge instructed: "It has nothing to do with the case whether he reports it to the authorities or not. You must determine whether the individuals were acting in any way either in the participation of the crime or benefitting from the crime." The initial and pertinent part of this instruction, which responded to the jury's question, is that failing to report a crime to the authorities is not tantamount to acting in concert. Petitioner argues that the second sentence of the instruction implicitly removed the element of intent from the jury's consideration. Although the sentence was unfortunately worded and technically incorrect, I disagree.

Jurors are presumed to be especially attentive during supplemental instructions principally because they are anticipating answers responsive to their questions. It is reasonable to assume that the focus of the jurors' attention will be on that portion of the answer that is directly responsive to their question and that they will, to the extent

possible, interpret those answers as being responses to their inquiries. The specific questions asked here pertained to intent to benefit and reporting known crimes to the authorities; they did not relate to whether criminal intent was required. *Cf. Arroyo* v. *Jones, supra,* 685 F.2d at 39-40. It is also clear from the record that the judge previously and repeatedly had instructed the jury on the burden of the state to prove *every* element of the crime, including intent. Accordingly, it is reasonable to conclude that the jurors understood the Court's statements as limited to answering their questions about intent to benefit and the reporting of crimes, and not as an instruction to disregard the previously described requirement that the State prove criminal intent beyond a reasonable doubt.*

This conclusion is further justified by the fact that "the timing in the present case of the jury's return with its verdict provides no basis for inferring that the jury [misapprehended the instructions]." *Rock* v. *Coombe, supra,* 694 F.2d at 917. *Cf. Francis* v. *Franklin, supra,* 53 U.S.L.W. at 4497 (jury returned a verdict of guilty ten minutes after defective charge); *Bollenbach* v. *United States, supra,* 326 U.S. at 610 (jury returned a verdict of guilty five minutes after erroneous instructions); *Arroyo* v. *Jones, supra,* 685 F.2d at 40 (jury returned a verdict of guilty less than one-half hour after defective charge). In the present case, after receiving the supplemental instructions, the jury deliberated for forty minutes before sequestration for the night, and then for another two hours the next morning before returning a verdict.

---

* If the supplemental instructions were to be interpreted as petitioner suggests, they would directly contradict portions of the Court's main charge. There is less of a danger of misleading a jury in such a case than where the assertedly erroneous instruction is not inherently inconsistent with the other parts of the jury charge. This distinction is not insignificant. *Cf. Francis* v. *Franklin, supra,* 53 U.S.L.W. at 4499.

In short, the jury could not have reasonably interpreted the supplemental instructions, in the context of the questions asked and the entire charge, to eliminate the element of intent from their consideration. Petitioner's third claim is therefore meritless.

Conclusion

Based upon the foregoing, I conclude that petitioner's *Miranda* claim is procedurally barred and that his remaining claims should be denied on the merits.

Pursuant to Rule 7 of the Rules of Proceedings Before A United States Magistrate, the parties shall have ten (10) days from this date to file written objections to this Report and Recommendation. Such objections shall be filed with the Clerk of the Court, with extra copies delivered to the chambers of the Honorable Charles E. Stewart, Jr., Room 2203, and to the chambers of the undersigned, Room 503.

Dated: New York, New York
September 5, 1985

Respectfully Submitted,

/s/ MICHAEL H. DOLINGER

MICHAEL H. DOLINGER
United States Magistrate

Copies of the foregoing Report and Recommendation have been mailed to:

Mr. Claude Holland
77-A-4844
Auburn Correctional
Facility
135 State Street
P. O. Box 618
Auburn, New York 13022

Ray F. Cerreta, Esq.
Assistant District Attorney
Queens County
125-01 Queens Boulevard
Kew Garden, New York 11415

Order of the United States District Court for the Southern District of New York, Judge Charles E. Steward 2/11/86

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

84 Civ. 106 (CES)

CLAUDE HOLLAND,

Petitioner,

against

C.J. SCULLY, Warden, Green Haven Correctional Facility, and ROBERT ABRAMS, Attorney General of the State of New York,

Respondents.

STEWART, District Judge:

Petitioner was convicted with two co-defendants of felony murder and was sentenced to imprisonment for 25 years to life. He asserts in this habeas corpus petition three grounds for setting aside his conviction:

1. The denial of his pretrial motions to sever and the admission of inculpatory statements by the two co-defendants (neither of whom testified) violated his sixth amendment right to confrontation, *Bruton* v. *United States*, 391 U.S. 123 (1968);

The admission of an inculpatory statement made by him violated his fifth amendment right to counsel, *Miranda* v. *Arizona*, 384 U.S. 436 (1966); and

3. Certain supplemental jury instructions denied him due process because they removed the issue of intent from the jury.

Magistrate Dollinger has issued a thorough and exhaustive Report and Recommendation, in which he recommends that the first and third claims should be denied on the merits and that consideration of the second claim is barred by the procedural default rule in *Wainwright* v. *Sykes,* 433 U.S. 72 (1977). We accept and affirm the Magistrate's Recommendation.

In brief, according to the prosecutor's evidence at trial, Holland (petitioner) and Moore (co-defendant) stole identification papers from another person which Moore used to rent a van the following day. The van was then used by Moore and Payton (the other co-defendant) in the course of committing a robbery in which Moore shot and killed a third person. Moore and Payton then drove a short distance away from the scene in the van, which they then abandoned and drove off in a truck left for them by Elliott (a third co-defendant, who pleaded guilty before trial). The latter testified at length at trial and his testimony directly inculpated Holland). All four met immediately thereafter and divided the proceeds of the robbery among themselves. Holland then drove Moore and Payton to the airport to catch a plane. He later disposed of the gun used in committing the murder by throwing it in a sewer. The gun was recovered by the police when Holland pointed out to them the sewer in which he had placed it.

Inculpatory statements given to the police by each of the defendants, that is, petitioner, Moore and Payton, were received in evidence at trial over petitioner's objection.

In his analysis, the Magistrate concluded first that petitioner had properly exhausted his claim with respect to his contention that the supplemental jury instruction was improper and that, accordingly, all three claims were ripe for consideration by the Court.

The *Bruton* claim required the Magistrate's most extensive consideration. After a careful review of the evidence, he concluded that petitioner's own inculpatory statements did not (as argued to the contrary by respondents) sufficiently mesh with those of his co-defendants (Moore and Payton) so as to come within the exception of *Bruton* which is applicable where such statements have been found to "interlock" with those of other defendants. *See, e.g., United States* v. *Paternina-Vergara*, 749 F.2d 993-98 (2d Cir. 1984). He found, rather, that petitioner's own statements did not conclusively establish, as did those of Moore and Payton, the requisite specific intent to engage in the crime charged. On the other hand, he concluded that the trial court's error in receiving the statements of the co-defendants was harmless, since other evidence inculpating petitioner (including his own statements, the devastating testimony of Elliott, the fact of petitioner's having directed the police to the sewer in which he had disposed of the gun and the identification by a third party of petitioner as one of the men who stole the identification papers used in renting the van) was overwhelming. In recommending denial of this claim for this reason, the Magistrate relied on *Schneble* v. *Florida*, 405 U.S. 427 (1972); *Harrington* v. *California*, 395 U.S. 250 (1969); *Hawkins* v. *LeFevre*, 758 F.2d 866 (2d Cir. 1985); *Anderson* v. *Smith*, 751 F.2d 96 (2d Cir. 1984); and *Tamilio* v. *Fogg*, 713 F.2d 18 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 706 (1984), among others.

The *Miranda* claim is based on petitioner's contention that the third and last of his statements to the police was made after he had invoked his right to counsel. The Magistrate found that, because this claim had not been properly raised on appeal in the state courts, it was barred under *Wainwright* v. *Sykes*, 433 U.S. 72 (1977) absent a showing of "cause" and "prejudice". He also found no cause and, since the matters related in the statement in question were established at trial by other evidence, there was no prejudice.

Petitioner's third claim is based on responses given by the trial court to two questions raised by the jury during their deliberations. The responses were given to the jury after they had been deliberating for seven or eight hours. The deliberations of the jury continued thereafter for another two and a half hours. In the context of the precise, narrow questions asked and in light of the extensive emphasis placed on the element of intent in the judge's charge, the somewhat inartful wording of the responses cannot fairly be found to have misled the jury on the requirement of finding the necessary criminal intent, as the Magistrate concluded.

Having reviewed the record, we affirm the Magistrate's findings and conclusions and accept his Report and Recommendation. The petition is dismissed.

So Ordered.

United States District Judge

Dated: New York, New York
February 11, 1986

Decision of the United States Court of Appeals for the Second Circuit 7/27/86

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1364—August Term 1985

Argued: May 20, 1986 Decided: July 7, 1986

Docket No. 86-2100

CLAUDE HOLLAND,

Petitioner-Appellant,

—against—

CHARLES J. SCULLY, Superintendent, Green Haven Correctional Facility, and ROBERT ABRAMS, Attorney General of the State of New York,

Respondents-Appellees.

Before:

LUMBARD, OAKES and MESKILL,

Circuit Judges.

Appeal from a judgment and order of the Southern District, Charles E. Stewart, Jr. *J.*, denying petition for a

writ of habeas corpus. Petitioner appeals on ground that, *inter alia*, admission of confessions of two non-testifying co-defendants was unconstitutional under *Bruton v. United States*, 391 U.S. 123 (1968).

Remanded with direction to grant the writ unless petitioner is retried within a reasonable time.

BARRY BASSIS, New York, N.Y. (The Legal Aid Society, Federal Defender Services Unit, New York, N.Y., Phylis Skloot Bamberger, of counsel), *for Petitioner-Appellant.*

RAY CERRETA, Assistant District Attorney, Kew Gardens, New York (John J. Santucci, District Attorney Queens County, Kew Gardens, New York, of counsel), *for Respondents-Appellees.*

LUMBARD, *Circuit Judge*:

Claude Holland appeals from an order and judgment of the Southern District, Charles E. Stewart, Jr., *J.* entered on February 11, 1986, denying his petition for a writ of habeas corpus. Holland is currently serving a term of twenty-five years to life for felony murder, having been convicted, along with two co-defendants, after a 1977 jury trial in the New York State Supreme Court, Queens County. In denying the writ, Judge Stewart adopted the

Report and Recommendation of Magistrate Michael H. Dolinger, dated September 5, 1985. The district court granted a certificate of probable cause to appeal on March 3, 1986, and this appeal followed.

Holland's petition argues three grounds for granting the writ. First, Holland argues that his sixth amendment rights were violated by admission at his trial of the confessions of his co-defendants whom he could not cross-examine. *See Bruton v. United States*, 391 U.S. 123 (1968). Second, Holland argues that the trial court violated his fifth amendment right against self-incrimination by admitting at trial his confession, part of which he alleges to have been taken in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966). Third, Holland argues that the trial judge's supplemental instructions to the jury during its deliberations violated his right to a fair trial because the instructions gave the jury the misleading impression that it could convict Holland of the substantive crime of robbery without proof of his intent. Because we agree with Holland's first claim, that his trial was fundamentally tainted under *Bruton* by the admission of his co-defendants' confessions, we remand to the district court with direction to grant the writ unless Holland is retried within a reasonable time.

In May, 1976, Holland's co-defendants and old friends Percy Moore and Richard Payton travelled from Chicago to New York and moved in with him. A month later, on June 25, 1976, Moore and Payton robbed the Van Dam check cashing facility in Long Island City, Queens. In the course of the robbery Moore shot and killed George Caccavalle, an off-duty transit patrolman and owner of the check-cashing business. Holland, Moore, Payton, and a fourth accomplice named Arthur Elliott, were subse-

quently indicted for first-degree murder, felony murder, first-degree robbery, and possession of a weapon.

Before trial in the State Supreme Court, all four defendants moved for a severance under *Bruton* because the State intended to introduce statements from each of them that might inculpate the others. In addition, all four moved to suppress their own inculpatory statements, under *Miranda*. After nine days of testimony, State Supreme Court Justice Thomas Agresta denied the pretrial motions to the extent that they sought separate trials, holding that severance was not required under *Bruton* because each of the defendants had made statements implicating themselves as well as their co-defendants. Justice Agresta also denied each defendant's request for redaction of incriminating portions of his co-defendants' statements. Finally, he denied all the motions to suppress except as to one statement made by defendant Moore.

Following pretrial hearings, but before trial, Elliott pled guilty to robbery in the first degree and agreed to testify at trial. Holland, Moore, and Payton were tried together, and the jury convicted all three of felony murder on November 16, 1977. On December 14, 1977, the court sentenced Holland and Moore to twenty-five years to life, and Payton to twenty years to life. Elliott received a ten-year sentence on his plea of guilty to robbery.

Through the testimony of eyewitnesses, of Elliott, and of Payton's wife, the State sketched the involvement of all the defendants in the Van Dam robbery. After Moore and Payton moved in with Holland in New York in May, 1976, the three men together visited the Van Dam check-cashing office on several occasions. At trial, Caryl Thompson identified Holland as one of two men who, on

June 24, 1976, the day before the robbery, held him up in the elevator of his Brooklyn building; they took his wallet, which contained his drivers' license and other identification.

Elliott testified that on the evening of June 24 he visited the apartment of Holland, whom he knew from work. Holland introduced Elliott to Moore and Payton, and told him that they were planning to rob the Van Dam facility; he asked whether Elliott wanted to make some money. Elliott agreed. He testified that the plan called for him to take his truck and pick up Moore and Payton at 9:00 A.M. the next morning at a designated rendezvous point. Holland would arrive in his own car. The three men told Elliott that Moore and Payton were going to rent a getaway van from Goldie's Leasing, using someone else's driver's license, which they had already obtained. Holland was not supposed to participate in the actual robbery, but was to drive Moore and Payton to the airport after they had divided the loot.

On the morning of June 25, Holland dropped Moore off near Goldie's. Moore rented a van, using the stolen identification papers, and provided Goldie's with a telephone number which later turned out to be Holland's. Moore and Payton drove the van to the Van Dam facility in Long Island City, Queens. By 9:00 A.M., a number of people were waiting outside. Demary Alicea, one of the Van Dam employees who opened up that morning, testified that she saw a red Goldie's van parked outside the office, with a man sitting in it whom she identified at trial as Moore. Three other witnesses also saw the van parked outside the facility, with one or two men sitting in it.

Shortly after the store opened, George Caccavalle, an off-duty transit detective who regularly delivered the Van

Dam cash payroll, arrived with the cash for the week. As he carried some of the money in a canvas bag from his car to the store, he was struck by three or four gunshots. After Caccavalle fell to the ground, the gunman took the money bags, jumped in the Goldie's van, and drove off.

By the time of the shooting, just after 9:00, Elliott had arrived at the designated meeting point. He saw Holland sitting in his car about half a block away and waved to acknowledge his presence. By 9:05 or 9:07, Moore and Payton had arrived in the red Goldie's van. Leaving the van behind, the two men got into Elliott's truck, carrying what appeared to be a money bag. Elliott then drove to his mother-in-law's house in Brooklyn, with Holland following in his own car.

According to Elliott, the four men entered the house and went upstairs. Elliott kept watch out of the window of one room, while the three men were in a back room counting the money. About ten minutes later, Holland told Elliott that the robbers had recovered $33,000, and gave him $3,000 of it. Holland, Moore, and Payton each received $10,000. At some point Holland went to his car, and brought back a suitcase that contained changes of clothes for Moore and Payton. Elliott then departed, and was told that Holland was going to drive Moore and Payton to the airport.

The next morning, after reading about the robbery in the newspaper, Elliott called Holland and told him that the person shot in the robbery was a police officer and that he was dying. Elliott testified that Holland's answer was that he was "sorry it was a cop, it [is] going to bring a lot of heat." Caccavalle died that day of injuries resulting from the gunshot wounds. Shirley Payton testified that

Payton discussed the facts of the robbery with her, and that she saw Holland with her husband in Chicago a week later.

Holland's Statements

A number of police officers testified to inculpatory statements made by Holland in the course of investigations. Holland's phone number appeared on the Goldie's rental slip and the police first questioned him on June 28, 1976. Holland could not explain why his number was on the slip, but showed police his business card to demonstrate that many people had access to the number.

On July 19, 1976, Shirley Payton contacted the New York City police and gave a taped interview. Two days later, the police arrested Holland at his workplace and read him his rights. They took him to the 114th Precinct, where Detective Delphin Greene again gave him the *Miranda* warnings. Holland said that he was willing to answer questions. He admitted that he had known about the robbery because his friends "Richard and Percy" from Chicago had planned it at his house. Although he denied having been at the scene "when the robbery went down," he admitted that he met them after the crime and accompanied them to Elliott's mother-in-law's house. Greene testified that Holland admitted that they had "split up the money." Holland also admitted that he threw the money bag containing Moore's and Caccavalle's guns into a sewer in front of a church on Washington Avenue. Holland then agreed to make a statement to an Assistant District Attorney.

Later that night, A.D.A. Albert Gaudelli took a taped statement from Holland, after advising him of his rights.

In answer to a series of Gaudelli's questions, Holland stated that Moore and Payton were old friends from Chicago who had come to visit him about a month before the robbery. The two men accompanied Holland to Van Dam several times when he cashed his checks and, about three weeks before the robbery, told him that they might rob the facility. On June 24, 1976, in a conversation in front of Elliott, Moore and Payton told Holland that they were planning the robbery for the following morning, and that the plan called for them to shoot the man carrying the money so that he would drop his gun.

The two men, Holland continued, said that they needed a van for the hold-up, and asked where they could rent one. He said he usually rented from Goldie's Leasing. They asked if he could drop them off at Goldie's the next morning on his way to work, and he agreed. According to Holland, during the conversation Moore told him that he and Payton "had took" a license from someone in Brooklyn and were going to use it to rent the van; Holland remembered the name on the license as "Carl." He also admitted that he drove Moore to Long Island City the next morning at 7:00 A.M.

Although Holland denied any participation in the robbery, he did admit that he had some additional involvement after the fact. First, he discussed the robbery with Payton shortly after it occurred, and Payton told him that, during the robbery, Moore had shot Caccavalle several times because he tried to raise his gun. Holland also discussed the robbery with Elliott at that time, who said that Caccavalle's death would "bring a lot of heat." Holland admitted calling Payton on June 27 to tell him that Caccavalle was a police officer, during which conversation Payton told him that the robbery had netted

$33,000, and that $3,000 had gone to Elliott for driving Moore and Payton to the airport. Finally, Holland admitted that on July 17, four days before his arrest, he spoke with Moore and requested money from him in return for his silence and because he needed to get a lawyer.

At the end of the tape, Holland told Gaudelli that he wanted to talk to a lawyer. Guadelli left Holland alone, and about twenty minutes later (at approximately 11:45 P.M.) Detective John Daly placed a Yellow Pages in front of Holland, opened to "Lawyers." Daly testified that Holland then asked him what the directory was for, and he replied that Gaudelli had told him that Holland wanted a lawyer. Holland then supposedly said "I don't really want a lawyer, I am going to get one in court." Daly responded that he wanted to ask Holland questions and that Holland was entitled to get a lawyer. Daly testified that Holland repeated "I'll get one in court."

Daly testified that, after he again advised Holland of his rights, he accused him of having lied during the taped interrogation. According to Daly, Holland then dropped his head and said "Now I'm going to get involved." When Daly said he believed that Holland had received money from the robbery, Holland admitted getting a $10,000 share. Holland also admitted placing Moore's and Caccavalle's guns into the money bags and throwing them into a sewer in front of a church on Washington Avenue in Brooklyn. This admission coincided with one of the statements he had supposedly made originally to Detective Greene.

Daly and other police witnesses testified that the police subsequently searched the sewers near the church on Washington Avenue, but could not find the bag. As a

result, they took Holland to the site and he directed them to the correct sewer where, the next day, the police retrieved the two guns and the money bag.

Payton's and Moore's Statements

Payton and Moore each gave statements to Detective Daly the morning after their arrest, in Chicago, on July 21, 1976. These statements, which had been transcribed by a court reporter, were received into evidence over Holland's *Bruton* objection.

Payton stated that, about two weeks before the robbery, Elliott brought up the idea of robbing the Van Dam facility. Payton said that he, Elliott, Moore, and Holland all had originally planned to commit the robbery on June 11, 1976, but had to call off the robbery that day because the money courier was unexpectedly carrying a gun. The following week, they tried again, but arrived too late and missed the delivery of the payroll.

Payton stated that Holland and Moore had obtained a driver's license from someone just prior to the third attempt. On the morning the robbery finally took place, June 25, Payton met Holland and Elliott at their workplace while Moore rented the van. Holland then drove Payton to a location near the Van Dam facility, where Moore awaited with the van. Payton got behind the wheel of the van, and Holland then drove off; Payton stated, however, that Holland drove by several times while Moore and Payton waited in the parked van. When Caccavalle arrived with the money bags, Moore got out of the van, shot him three times, grabbed the bags, and jumped back into the van. Payton then drove to the prearranged meeting-place, where Holland and Elliott awaited.

Payton went on to state that, at that point, he and Moore abandoned the van and got into Elliott's truck, while Holland left in his own car. They all drove to Elliott's mother-in-law's house, where they counted and divided the money. According to Payton, he, Moore, and Holland each received $10,000, and Elliott was given $3,000. After Moore and Payton changed their clothes, Holland drove them to Newark airport, where they took a flight to Chicago. Holland was supposed to dump the money bag and the guns into the Atlantic Ocean. Payton's statement concluded by recounting that Holland had visited him in Chicago on July 17, asking for money to hire a lawyer.

Moore's statement to Detective Daly was substantially similar to Payton's. He said that in May, 1976, Holland had called to say that he "had something nice"—Moore assumed this referred to a money-making deal. Moore and Payton went to New York in June, and stayed with Holland until the robbery. They stole some furs, but, because this did not produce much money, began to consider holding up the Van Dam check-cashing facility; they cased the office once or twice in preparation. In addition, according to Moore, he and Holland robbed a man of his identification papers for use in the crime. Moore's account of the robbery, the shooting, and the division of the loot parallelled Payton's. He stated that he never spoke to Holland again after Holland drove Moore and Payton to the airport.

None of the defendants testified at trial, and Holland called only one witness, Detective John O'Connell. O'Connell testified that he had spoken to Holland in July, 1976, and Holland had at that time denied participating in the robbery.

In his summation, the prosecutor encouraged the jury to consider the statements of Moore, Payton, and Holland as a group against the defendants, arguing that any credibility concerns the jury might have should be alleviated by the statements' mutually supportive framework. He also dwelled on Holland's role as the "mastermind" of the robbery, citing as proof facts contained exclusively in the statements of Moore and Payton. In conclusion, he urged the jury to bring in guilty verdicts against the three defendants who, unlike Caccavalle, were not "citizens of this community"—presumably lumping together Payton, Moore, and Holland (who was a New York resident).

The court's charge gave the jury limiting instructions on the use of the co-defendants' statement and emphasized that the People had the burden of proving all the elements of the crime beyond a reasonable doubt. Justice Agresta went on to detail the nature of the intent required to convict the defendants of the crimes charged, and gave particular emphasis to the definition of "acting in concert," which is a prerequisite to a conviction for aiding and abetting. After several hours of deliberation, at 10:55 P.M., the jury sent two notes to the court, both of which bore on the guilt or innocence of Holland.

The first note read:

> Would a person be acting in concert even if he helps in the commission of a crime without intent receiving [sic] personal benefits from the crime?

Justice Agresta responded:

> It makes no difference what his intent was. If he is acting in concert, he is equally liable with everybody else.

BEST AVAILABLE COPY

The second note read:

> Would a person be acting in concert if he . . . had knowledge of a crime, without reporting it to the proper authorities?

Justice Agresta responded:

> It has nothing to do with the case whether he reports it to the authorities or not. You must determine whether the individuals were acting in any way either in the participation of the crime or benefitting from the crime; that's your responsibility in determining the innocence or guilt of each of the defendants.

After the jury went back to deliberate, Holland objected unsuccessfully to both supplemental instructions. The jury was sequestered for the night, and after deliberating the following morning, convicted the three defendants of felony murder. On December 14, 1977, Justice Agresta sentenced Holland and Moore to indeterminate prison terms of 25 years to life, and Payton to a term of twenty years to life. All three men are currently serving their sentences.

Holland appealed to the Appellate Division, Second Department, raising two claims: 1) that the introduction of his co-defendants' statements at trial had violated his sixth amendment right to confrontation under *Bruton*, and 2) that the supplemental instructions by Justice Agresta erroneously eliminated intent as an element of the substantive offense. The Appellate Division affirmed without opinion on February 23, 1981. *See People v. Holland*, 80 A.D. 2d 753 (2d Dep't 1981). The New York Court of Appeals denied leave to appeal on April 30, 1981.

In May, 1982, Holland moved pro se before Justice Agresta to vacate his conviction pursuant to N.Y.C.P.L. § 440.10. He asserted three grounds to vacate: 1) that he had been arrested in violation of *Dunaway v. New York*, 442 U.S. 200 (1979), and that any resultant statements he made should have been suppressed; 2) that his inculpatory statements had been obtained in violation of his right to counsel and his right against self-incrimination; and 3) that the joint trial and the admission of all the defendants' statements had violated *Bruton*. On June 14, 1982, Justice Agresta ruled that Holland's motion was procedurally barred under N.Y.C.P.L. § 440.10 (2)(a) and (2)(c), because the claims either had been or should have been raised on direct appeal to the Appellate Division. On September 24, 1982, the Appellate Division denied Holland leave to appeal the June 14 decision.

On February 15, 1983, Holland filed a pro se motion in the Appellate Division for reargument and reconsideration of his direct appeal, pursuant to N.Y.C.P.L. § 470.50. He argued that his appellate counsel had been ineffective because he failed to raise two meritorious issues on appeal. One of these, which trial counsel had raised and which Justice Agresta had denied in pre-trial proceedings, was that Holland's statements to Detective Daly following his request for a lawyer were inadmissible under the fifth amendment and under *Miranda*. On July 6, 1983, the Appellate Division summarily denied Holland's motion. On October 12, 1983, the New York Court of Appeals dismissed as untimely Holland's request for reconsideration of the court's earlier denial of leave to appeal his direct case, and also denied his request for leave to appeal the Appellate Division's ruling on the

motion to reargue on the ground that such a ruling is not appealable under N.Y.C.P.L. § 460.20.

On January 6, 1984, Holland filed a pro se habeas corpus petition in the Southern District, and counsel was assigned. Holland filed an amended petition on September 4, 1984, which argued three points. First, he argued that the introduction of inculpatory statements by Holland's co-defendants, the prosecutor's use of those statements, and the trial court's refusal to grant a severance or to redact incriminating portions of the statements violated Holland's constitutional right to confront and to cross-examine his accusers. Second, he argued that the introduction of Holland's statements to Detective Daly violated his rights under the fifth and sixth amendments. Third, he argued that Justice Agresta's supplemental instructions on acting in concert violated Holland's due process right to a fair trial because they eliminated from the jury's consideration the element of intent needed to support a conviction for aiding and abetting.

On September 5, 1985, the Magistrate issued his Report and Recommendation, which sugggested that the district court deny the petition. The Magistrate began by noting that Holland had exhausted all of these claims in the New York state courts, and therefore the district court was empowered to consider the petition on collateral attack. As to the first claim, the Magistrate concluded that there had been a *Bruton* violation, but that it constituted harmless error. The Magistrate next concluded that, although all the claims were properly exhausted, consideration of the *Miranda* claim was nonetheless barred, under *Wainwright v. Sykes*, 433 U.S. 72 (1971), because of Holland's procedural default in the state courts. Finally, the Magistrate argued that the supplemental jury instruc-

tions, though problematic, did not amount to a due process violation in the context of the court's charge. In an opinion dated February 11, 1986, the district court adopted the Magistrate's recommendation and denied the petition. Holland appealed. We reverse in part and remand because we believe that the trial was infected with a serious *Bruton* violation which, in the circumstances, and in light of the Supreme Court's recent decision in *Lee v. Illinois*, 54 U.S.L.W. 4555 (U.S. June 3, 1986), cannot be considered "harmless error."

Exhaustion

Respondents argue that Holland has failed to exhaust his state remedies with respect to his third claim, which asserts that the trial court's supplemental instructions violated due process by removing the issue of Holland's intent from the jury's consideration. *See In re Winship*, 397 U.S. 358, 364 (1970); *Francis v. Franklin*, 105 S. Ct. 1965 (1985). Although Holland did challenge these instructions on appeal in the state court, his claim there alleged only that the instructions violated the state statutory requirements for proving aiding and abetting; consequently, respondents argue that the state courts were not sufficiently alerted to, and could not have resolved, the federal constitutional aspect of Holland's claim. *See Daye v. Attorney General of New York*, 696 F.2d 186, 191-92 (2d Cir. 1982) (en banc), *cert. denied*, 104 S. Ct. 723 (1984). If the State were correct that Holland has failed to exhaust his third habeas claim, we would be compelled to remand the *entire* case to the district court with direction to dismiss. *See Rose v. Lundy*, 455 U.S. 509, 520 (1982). Holland would then have the option of returning his entire case to the state courts, or of deleting his instruc-

tions claim and bringing the petition again in the district court. *See Petrucelli v. Coombe*, 735 F.2d 684, 690 (2d Cir. 1984). We agree with the district court that Holland exhausted his remedies in the state courts; in light of our holding on the *Bruton* claim, however, we do not address the merits of the claim that the court's supplemental instructions were faulty.

Although Holland's state appellate brief did not explicitly argue that the supplemental instructions ran afoul of due process, we have held that a habeas petitioner's federal constitutional claims may be considered exhausted when the claims were "fairly"—though not explicitly—presented to the state courts. *See Daye, supra*, 696 F.2d at 191; *see also Picard v. Connor*, 404 U.S. 270, 275 (1971). According to *Daye*, there are four primary sets of circumstances in which a habeas petitioner may be said to have adequately alerted the state courts to the constitutional nature of his claims:

> (a) reliance on pertinent federal cases employing constitutional analysis, (b) reliance on state cases employing constitutional analysis in like fact situations, (c) assertion of the claim in terms so particular as to call to mind a specific right protected by the Constitution, and (d) allegation of a pattern of facts that is well within the mainstream of constitutional litigation.

696 F.2d at 191. Holland argues that he falls within the last of these categories, because the discussion of the supplemental instructions in his state appellate brief clearly called to mind the constitutional axiom that no person may be deprived of liberty without proof, beyond a reasonable doubt, of every fact necessary to constitute

the crime of which he is accused. *In re Winship*, *supra*, 397 U.S. at 364; *Davis v. United States*, 160 U.S. 469, 493 (1895).

Holland's brief to the Appellate Division argued that Justice Agresta's supplemental instructions failed to comport with New York's aiding and abetting statute, N.Y.P.L. § 20.00, which requires that the People prove "both the intent to commit the crime and actions in furtherance of that crime . . . ." Holland's brief did not challenge the instructions under the federal or state constitutions, nor did it cite the New York law requiring proof beyond a reasonable doubt of all elements of the crime, *see* N.Y.C.P.L. § 70.20. It did not even cite any of the many New York cases establishing the right to have the prosecution prove every element of the offense. *See, e.g.*, *People v. Newman*, 46 N.Y.2d 126, 128 (1978); *People v. Patterson*, 39 N.Y.2d 288, 301 (1976).

Nevertheless, we agree with the district court and the Magistrate that the facts alleged in Holland's brief should have called to mind fundamental due process principles. Holland's statutory argument noted that intent was a necessary element of liability as an accessory, and claimed that the supplemental instructions had removed intent from the jury's consideration. This factual pattern falls so squarely within the fundamental due process rule that the prosecution prove every element of the offense, *see Francis*, *supra*, 53 U.S.L.W. at 4497, that "no reasonable jurist could doubt that the defendant's claim implicated [a] constitutional right," *see Daye*, *supra*, 696 F.2d at 193. In light of the fourth criterion in *Daye*, Holland must be said to have adequately alerted the state court to his constitutional claims, and therefore the claim has been exhausted. *Id.* at 196-97.

We disagree with the State's argument that this case is governed by our decision in *Petrucelli*, *supra*, where a habeas petition was dismissed as unripe because the defendant had not adequately alerted the state courts to the constitutional aspects of his claim. *See id.*, 735 F.2d at 690. In *Petrucelli*, the defendant's arguments to the state courts merely intoned vague allegations that he had been denied a "fair trial" and "due process," but failed to mention that the double jeopardy clause provided the specific basis for his constitutional attack. *See id.* at 688-89. We held in *Petrucelli* that this kind of talismanic argumentation had been the subject of our precise disapproval in *Daye*, *see id.*, 696 F.2d at 193 (noting that "fair trial" claim would, taken alone, be overly vague), and accordingly dismissed the petition. Holland, by contrast, presented the state courts with a factual pattern that should have called to mind a *specific* constitutional challenge—that is, elimination of a requisite element of the crime alleged, in violation of the due process clause. Consequently, this case is distinguishable from, and is not governed by, our decision in *Petrucelli*.

Bruton Violation

Holland claims that the trial court's refusal to grant a severance, combined with the admission at trial of the statements of his nontestifying co-defendants, violated his sixth amendment right of confrontation under *Bruton v. United States*, 391 U.S. 123 (1968). The *Bruton* Court held that limiting instructions are inadequate to guard against the suspect credibility and potentially devastating prejudice arising from use of a co-defendant's inculpatory statements in a joint trial, when the co-defendant cannot be cross-examined. *See id.* at 135-36. The trial

court here nevertheless admitted the statements of Moore and Payton on the authority of the so-called "interlocking confessions" exception to *Bruton* that we originally articulated in *United States ex rel. Catanzaro v. Mancusi*, 404 F.2d 296, 300 (2d Cir. 1968), *cert. denied*, 397 U.S. 942 (1970). The trial court found the rationale of the interlocking confessions exception—that the "devastating" impact of a co-defendant's statements is absent or minimized when the defendant himself confesses—warranted admission of the statements against Holland. *See, e.g., United States ex rel. Stanbridge v. Zelker*, 514 F.2d 45, 48-49 (2d Cir.), *cert. denied*, 423 U.S. 872 (1975).

Holland points out, however, that although confessions need not be identical in all respects to be interlocking, *see Stanbridge*, *supra*, 514 F.2d at 49, they must at a minimum be "substantially the same and consistent on the major elements of the crime involved," *Tamilio v. Fogg*, 713 F.2d 18, 20 (2d Cir. 1983), *cert. denied*, 464 U.S. 1041 (1984); *see also United States ex rel. Ortiz v. Fritz*, 476 F.2d 37, 39 (2d Cir.) (interlocking confessions must be the same "[a]s to motive, plot and execution of the crime"), *cert. denied*, 414 U.S. 1075 (1973). Our traditional requirement that interlocking statements be identical on all key points comports with the recent decision in *Lee v. Illinois*, 54 U.S.L.W. 4555 (U.S. June 3, 1986), in which the Supreme Court rejected an application of the interlocking confessions exception. The *Lee* Court cautioned that "[i]f those portions of the co-defendant's purportedly interlocking statement which bear to any significant degree on the defendant's participation in the crime are not thoroughly substantiated by the defendant's own confession, the admission of the statement poses too serious a threat to the accuracy of the verdict to be

countenanced by the Sixth Amendment." 54 U.S.L.W. at 4559-4560.

Under our traditional interpretation of the interlocking confessions rule, and in light of the *Lee* decision, we agree with the district court that Holland's trial was infected by a serious *Bruton* violation. Although Holland's confession was similar to that of Moore and Payton in detailing many of the facts surrounding the Van Dam robbery, nowhere in his confession did Holland ever admit that he induced his co-defendants to commit—or even that he participated in the planning of—the crime. Thus, taken alone, Holland's confessions would certainly have been sufficient to convict him of the lesser offense of criminal facilitation. *See* N.Y.P.L. § 115.05. It is not at all clear, however, whether the jury would have inferred from Holland's statements the mental culpability necessary to convict him of aiding and abetting under N.Y.P.L. § 20.00, which in turn established his *personal* liability for the offense that he allegedly solicited—felony murder.

By contrast, Moore and Payton both testified that Holland was the mastermind, and had invited them to New York with the purpose of having them commit the robbery. Their damning testimony played a primary and essential role in making the case for aiding and abetting against Holland. This case is strikingly similar to *Lee*, in which the Court held that confessions cannot interlock when they diverge on matters as central as the defendants' various roles in the planning of the crime. *See* 54 U.S.L.W. at 4560. In remanding the defendant's conviction, the *Lee* Court stated that, whereas the defendant's confession alone would have rendered her liable for voluntary manslaughter, the admission of her co-defendant's statement added the element of premeditation and

thus made out a case of murder. The Court held that Lee's trial had therefore violated the Sixth Amendment: "[W]hen the discrepancies between the [supposedly interlocking] statements are not insignificant, the codefendant's confession may not be admitted." 54 U.S.L.W. at 4560; *see United States v. Paternina-Vergara*, 749 F.2d 993 (2d Cir. 1984).

The State argues, however, that any *Bruton* violation at Holland's trial constituted harmless error, because there was sufficient evidence to convict him whether or not the trial court had admitted the statements of Moore and Payton. Magistrate Dolinger agreed that the error was harmless, stating that in his view there was enough other evidence against Holland that an average jury would not have " 'found the state's case *significantly* less persuasive [absent the improper evidence].' " *See* Appendix at C. 39 (*quoting Schneble v. Florida*, 405 U.S. 427 (1972)). We believe, however, that the Magistrate, and consequently the district court, misconstrued *Schneble* and as a result used an improper standard to determine whether an error can be considered harmless.

In our view, the central point of *Schneble* is that a trial error cannot be "harmless" if there "is a reasonable possibility that the improperly admitted evidence contributed to the conviction." *Id.*, 405 U.S. at 432. Indeed, the Court reaffirmed this rule recently in *Delaware v. Van Arsdall*, 54 U.S.L.W. 4347 (April 7, 1986), in which the Court (per Rehnquist, *J.*) held that "harmless error" means "harmless beyond a reasonable doubt." *Id.* at 4349. Our decisions are in accord with *Schneble* and *Van Arsdall*. In *Anderson v. Smith*, 751 F.2d 96 (2d Cir. 1984), we remanded the defendant's conviction because of a constitutional trial error, noting that the error could only

have been harmless if the other, proper, evidence against the defendant had been "overwhelming." *Id.* at 105-06.

Applying the *Van Arsdall* standard to Holland's case, we cannot say that the *Bruton* error was harmless beyond a reasonable doubt. Considered apart from the statements of Moore and Payton, the State's case against Holland for aiding and abetting was far from overwhelming. First, Holland's confessions admitted only the elements of the lesser crimes of criminal facilitation or hindering prosecution, *see* N.Y.P.L. §§ 115.05, 205.50, but consistently denied any intent to solicit or to participate in the crime, which is a prerequisite to a conviction for aiding and abetting under New York law. *See, e.g., People v. Clarke*, 43 A.D.2d 834 (2d Dep't 1974) (defendant's knowledge of a robbery that resulted in felony murder, his supplying gun, and his cutting the robber's hair, were sufficient only for criminal facilitation or hindering prosecution but not for aiding and abetting). It is the purest speculation whether the jury would have inferred, from Holland's admitted marginal involvement in the robbery, his intent to be a participant.

Second, Elliott's testimony implicating Holland in the planning of the robbery directly contradicted Holland's statements, and Elliott's credibility as a witness was not at all clear. In this regard, we are particularly mindful of the *Lee* Court's recent discussion of a "reality of the criminal process, namely that once partners in crime recognize that the 'jig is up,' they tend to lose any identity of interest and immediately become antagonists, rather than accomplices." *Id.*, 54 U.S.L.W. at 4559. The third major piece of evidence that the State offered against Holland was Caryl Thompson's testimony that he had been robbed of his identification on June 24, 1976, and his in-court

identification of Holland as one of the robbers. Even assuming that the jury believed that Thompson had correctly identified Holland, his participation in the earlier robbery showed only circumstantially that he intended to participate in the second one.

We believe that the prosecution removed all doubt that the *Bruton* violation could be considered harmless when it belabored to the jury the "interlocking" nature of the confessions. In his summation, the prosecutor at great length surveyed the evidence supposedly showing Holland to be the "mastermind" of the crime, most of which derived exclusively from the statements of Moore and Payton. Over defense objections, the prosecutor often used Holland's co-defendants' statements to support the credibility of other witnesses such as Elliott and Thompson. And repeatedly in his summation, the prosecutor urged the jury to "[e]xamine these statements of Percy Moore and Richard Payton" as they tended to prove Holland's role in planning the Van Dam robbery. We have previously considered this kind of argumentation in a case involving the interlocking confessions exception to *Bruton*, and strongly cautioned the prosecution not to increase the possibility of prejudice by "disregard[ing] the instructions and urg[ing] the jury to convict one defendant *because* his co-defendant has confessed." *Kirksey v. Jones*, 673 F.2d 58, 60 (2d Cir. 1982).

The prosecutor's direct and indirect exhortations that the jury consider Moore's and Payton's statements against Holland magnified the dangers of permitting such statements in evidence at all; these dangers were doubly compounded in this case, which involved the factually overlapping confessions of *two* co-defendants. It strains our credulity to believe that, in the circumstances, the

jury could fairly evaluate the defendants' differing versions of the Van Dam robbery, and accordingly we are unable to conclude that the *Bruton* error was harmless beyond a reasonable doubt—the writ must be granted. *See Van Arsdall*, 54 U.S.L.W. at 4349-50; *cf. Lee*, *supra*, 54 U.S.L.W. at 4559 (noting that use of the interlocking confessions exception is particularly suspect where there is a strong likelihood that the factfinder considered a defendant's statement against his co-defendant). As Judge Friendly stated, reversing convictions in a similar trial: "It is impossible realistically to suppose that when the twelve good men and women had [one defendant's] confession in the privacy of the jury room, not one yielded to the nigh irresistible temptation to fill in the blanks with the keys [the other defendant] had provided . . . ." *United States v. Bozza*, 365 F.2d 206 (2d Cir. 1966).

Miranda Claim

Holland claims that the admission into evidence of the last of his three inculpatory statements, made to Detective Daly, violated his fifth amendment right against self-incrimination under *Miranda v. Arizona*, 384 U.S. 436, 474-75 (1966), because the statement was made after Holland had invoked his right to counsel. *See Edwards v. Arizona*, 451 U.S. 476 (1981) (restricting admissibility of confessions after right to counsel has been invoked); *People v. Cunningham*, 49 N.Y.2d 203 (1980) (same). The district court adopted the Magistrate's view that the court was precluded from considering the claim on the merits because Holland had failed to raise the issue on his direct appeal in the state courts. *See Wainwright v. Sykes*, 433 U.S. 72 (1977). We agree.

Holland's *Miranda* claim was not, but should have been, raised on Holland's direct appeal to the Appellate Division. This constituted a waiver under New York law, *see* N.Y.P.L. § 440.10(2)(c), and accordingly the trial court declined to reach the claim when it considered Holland's post-appeal motion to vacate. Holland argues, however, that he subsequently raised the *Miranda* issue on his motion for reargument to the Appellate Division, as a component of his argument that he had had ineffective assistance of counsel on his original appeal.

Holland's view is problematic, however, because there is no indication that the Appellate Division in fact reached the merits of the *Miranda* claim. Although Holland had missed the 30-day deadline for the motion to reargue, *see* 22 N.Y.C.R.R. § 670.5, under N.Y.C.P.L. § 470.50 the Appellate Division could nevertheless have ordered reargument if it would have been in the "interest of justice" to do so, and if the deadline had been missed for "good cause"—which "cause" may include incompetence of counsel. *See id.* Holland argued that his counsel had been incompetent, based in part on the failure to raise the *Miranda* claim; the State opposed solely on the procedural ground, and did not argue the merits of the *Miranda* claim. The Appellate Division denied Holland's motion without opinion. As Magistrate Dolinger noted, the Appellate Division's summary denial may well have been based solely on its recognition of the limited scope of the "interest of justice" jurisdiction; thus the court was not at all required to address the *Miranda* issue. *See Martinez v. Harris*, 675 F.2d 51 (2d Cir.) (establishing presumption that summary denial was based on procedural grounds), *cert. denied*, 459 U.S. 849 (1982).

Further, as the Magistrate pointed out, accepting Holland's view would undermine the procedural bar rule of N.Y.C.P.L. § 440.10(2)(c), recognized and given force on habeas review under *Wainwright*. A defendant who failed to raise an issue on direct appeal could at any subsequent point assert it in an untimely motion for reargument in the state appellate court, as a component of an argument that his counsel's incompetence was the "good cause" for his failure to comply with the 30-day deadline. Therefore, because we conclude that Holland failed to adjudicate his *Miranda* claim in the state appellate court, we are barred by *Wainwright* from considering the claim on habeas review, absent "cause" and "prejudice." *See Engle v. Isaac*, 456 U.S. 107, 129 (1982).

The Magistrate found that Holland had demonstrated no "prejudice" from admission at trial of the confession allegedly taken in violation of *Miranda*, and consequently argued that habeas consideration on the merits was barred. Because the Magistrate disposed of the claim on the basis of the lack of prejudice, he recommended that the court make no ruling on Holland's argument that his counsel's incompetence constituted the "cause" under *Wainwright* for the failure to raise the *Miranda* claim on direct appeal. *See Strickland v. Washington*, 104 S. Ct. 2052, 2069-70 (1984) (although counsel's incompetence can be "cause," court should avoid such a finding if claim can be decided on basis of "prejudice"). The district court, though purporting to adopt the Magistrate's opinion, suggested that Holland had failed to show *both* "cause" and "prejudice." In any event, we agree that the admission of the third confession did not "prejudice" Holland as that term has been construed, and thus we do

not rule on whether Holland's state appellate counsel had acted with incompetence sufficient to constitute "cause."

Unlike the test for harmless error, the test for "prejudice" sufficient to overcome a procedural default requires the petitioner to show that the error of which he is complaining on habeas "worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *United States v. Frady*, 456 U.S. 152, 170 (1982). Holland argues that the third statement, which presents the *Miranda* issue, contained the highly damaging admissions that he had received a $10,000 share of the robbery proceeds, and that he had hidden the guns and the money bag in a sewer. Holland overlooks, however, that his first uncontested statement to Detective Greene also contained admissions that he had hidden the guns and the bag, and that he had shared in the proceeds of the robbery; further, Elliott testified that Holland had received $10,000 from the robbery. Because the third statement added no facts that were not already in evidence from undisputedly proper sources, the admission of the statement was not "prejudicial." *See Forman v. Smith*, 633 F.2d 634, 642 (2d Cir. 1980) (noting that prejudice depends primarily on whether other evidence established key facts at trial).

Because we believe that Holland has failed to show that he was "prejudiced" under *Wainwright* by the admission at trial of his third confession, we agree with the district court that his procedural default in the state court bars us from considering the merits of the *Miranda* claim on habeas review.

Supplemental Instructions Claim

Holland argues that Justice Agresta's responses to the jury's questions during deliberations violated his due process right to a fair trial, because these supplemental instructions gave the jury the erroneous impression that they could convict Holland of aiding and abetting a robbery without proof of his intent. The Magistrate found that the instructions were misleading and technically incorrect, but nevertheless concluded that, when seen in the context of the court's charge and the jury's deliberations, they did not so infect the trial process that the result violated due process. *See Cupp v. Naughten*, 414 U.S. 141, 146-47 (1973). We have noted that we agree with the Magistrate that this claim was exhausted in the state courts, and thus can be considered on the merits. Because we grant the writ based on the *Bruton* violation that tainted Holland's trial, however, we need not reach the merits of the supplemental instructions claim.

Conclusion

We believe that the admission of the statements of his co-defendants violated Holland's sixth amendment rights under *Bruton*, and that the violation cannot be considered harmless error in the circumstances. Accordingly, we remand Holland's conviction with a direction that the district court grant the writ of habeas corpus unless Holland is retried within a reasonable time.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.